Supreme Court, U.S.
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DEC 19 1990
JOSEPH F. SPANIOL, JR.
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90-991
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
and FRVR CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Date: December 19, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED*

1. Does Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, impose a judicially enforceable obligation on a railroad to bargain over a rail union's proposal under Section 6 of the Act, 45 U.S.C. § 156, for an agreement that would protect the interests of employees who may be adversely affected by a sale of a portion of the carrier's rail system to another for continued operations, by requiring the railroad to sell the portion of its lines in such a way that the employment rights of adversely affected employees will be preserved?

2. In those cases where the collective bargaining agreement neither authorizes nor prohibits a carrier from taking a disputed action, does the Railway Labor Act's status

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* Petitioners in this case are the Railway Labor Executives' Association and the following labor organizations:

American Railway & Airway Supervisors Association (Division of TCU);
American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood of Railway Carmen (Division of TCU);
International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
Sheet Metal Workers' International Association;
Transportation•Communications International Union (TCU);
Yardmasters' Department (UTU); and
United Transportation Union.

The Interstate Commerce Commission had intervened in this case in 1988, but did not participate in this case during the district court's consideration of the issues on the permanent injunction request, or while on appeal to the Seventh Circuit from the permanent injunction. Petitioners submit that the Commission, accordingly, has no interest in the outcome of this petition. *See*, Rule 12.4 of the Rules Of This Court.

quo obligation require the railroad to preserve and maintain unchanged, as this Court held in *Detroit & Toledo Shore Line R. v. UTU*, 396 U.S. 142 (1969), those actual, objective working conditions and practices, which were in effect prior to the time the dispute arose and which are involved in or related to that dispute, or does that obligation require a railroad, as the Seventh Circuit held, to refrain from altering only those employment terms which are established by an express or implied contract?

3. Does a carrier's claim of a right, not prohibited by contract, to take a disputed action while bargaining over a union's Section 6 notice, relieve the carrier of its obligation, imposed by the Railway Labor Act's major dispute resolution procedures, to maintain the status quo during bargaining?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Railway Labor Executives' Association [1] and fourteen (14) labor organizations,[2] which are also peti-

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[1] RLEA is a voluntary, unincorporated association of the chief executive officers of seventeen (17) labor organizations which collectively represent most railroad employees in this Country. A list of RLEA's affiliated labor organizations is reproduced herein as App. G at 78a; those organizations, which are petitioners herein, are marked by asterisks.

[2] The fourteen petitioning labor organizations, all but two of which are affiliated with RLEA, represent employees of the Chicago & North Western Transportation Co.; they are listed in footnote * on page (i) of this petition.

tioners herein, respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review both the decision of that court in *Chicago & North Western Transportation Co. v. RLEA*, 908 F.2d 144, and the case which is currently pending in that court as 7th Cir. No. 90-2496, *Chicago & North Western Transportation Co. v. RLEA*.[3]

OPINIONS BELOW

1. The decision of the court of appeals is reported at 908 F.2d 144 and is reproduced herein as Appendix A at 1a-26a. The Memorandum Opinion and Order, and the judgment of the United States District Court for the Northern District of Illinois, which were affirmed by the appellate court, are not reported; they are reproduced herein as Appendix B at 27a-34a.

2. 7th Cir. No. 90-2496, which is still pending before the court of appeals, is an appeal from the permanent injunction entered by the district court in this case on July 2, 1990. That injunction and the accompanying judgment are not reported and are reproduced herein as Appendix C at 35a-39a.

3. On August 23, 1988, the court of appeals issued an earlier opinion in this case affirming a preliminary injunction; that earlier appellate court decision is reported at 855 F.2d 1277 and is reproduced herein as Appendix D at 40a-61a. This Court denied petitioners' request for a writ of certiorari to review that decision on November 28, 1988 (488 U.S. 966) and their petition for rehearing on January 23, 1989 (488 U.S. 1051).

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[3] Petitioners are requesting this Court to issue this writ to review two (2) cases, one of which—*i.e.*, 7th Cir. No. 90-2496—is still pending before the court of appeals. As we explain more fully below, petitioners have included the second case within the scope of this petition (*see*, Rule 12.2 of the Rules of this Court) to eliminate any question as to jurisdiction.

JURISDICTION

The decision of the court of appeals was entered on July 17, 1990, and petitioners' timely request for rehearing was denied on August 21, 1990. Appendix E at 62a. Petitioners sought and were granted on November 8, 1990 an extension to and including December 19, 1990 in which to file this petition. Sup. Ct. No. A-352. This petition is timely as to both the decision entered on July 17, 1990 and the case still pending before the court of appeals. 28 U.S.C. § 2101(c). Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the proper interpretation of the scope of the bargaining and status quo commands of the Railway Labor Act which, as applicable here, are included in Sections 2 First, 5 First and 6 of that Act, 45 U.S.C. §§ 152 First, 155 First and 156, and the relationship of those sections to Section 3 of the Act, 45 U.S.C. § 153. Those statutory provisions, as well as Section 2 Seventh of the Act, 45 U.S.C. § 152 Seventh, are set forth in Appendix F at 63a-77a.

STATEMENT OF THE CASE

This case arises out of rail labor's efforts to compel respondent Chicago & North Western Transportation Company [hereinafter, "C&NW"] to bargain for an agreement that would protect the employment rights of C&NW employees who might be, and now have been, affected by the C&NW's sale of 208 miles of its 6,000 mile rail system to respondent FRVR Corporation for continued rail operations.[4] Respondent C&NW's objec-

[4] In early 1986, the C&NW's system included an additional 1,000 miles of rail lines, but in mid-1986 the C&NW sold about 1,000 miles of line to a newly-formed carrier for continued rail operations. Rail labor challenged the C&NW's right to sell that line without first bargaining and that challenge resulted in a decision by the Eighth Circuit which ruled that the dispute raised by rail labor's

tions to rail labor's bargaining demand, and the lower courts' contradictory decisions issuing and upholding an injunction enjoining rail labor from ever striking "over the sale of the Duck Creek South lines [*i.e.*, the 208 mile line] or the effects of the sale on employees" (App. C at 38a), raise important issues concerning the scope of a railroad's duties under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to bargain and to preserve the status quo during that bargaining. In addition, the district court's decision to issue the injunction because the "dispute" between the unions and the C&NW was, in its opinion, "a minor dispute subject to mandatory arbitration under § 3 of the Railway Labor Act" (*Id.*), and the Seventh Circuit's decision to affirm that injunction, but to instruct the district court "to vacate its order to arbitrate as moot" since there was no dispute over the interpretation of contracts to be resolved by an adjustment board (App. A at 26a), present in very graphic terms the need for guidance from this Court in order to insure that the Act's major dispute resolution process is not thwarted by the inappropriate application of the minor dispute dichotomy to what is actually a dispute over the scope of the Act's status quo obligations.[5]

A. Rail Labor's Efforts To Bargain

Once rail labor learned in 1987 that the C&NW was considering selling its Duck Creek South lines, the unions began to serve notices on the C&NW pursuant to Section

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requests to bargain was a major dispute, and not a minor one as the C&NW asserted, but that the C&NW need bargain only over the effects of the sale on employees and could sell during the bargaining process. *RLEA v. C&NW*, 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 3237 (1990).

[5] Railway Labor Act disputes over rates of pay, rules or working conditions are classified as being either "major" or "minor." Major disputes are ones over proposed changes to existing agreements or the proposed formulation of new agreements. Minor disputes are ones over the interpretation of existing agreements. *Consolidated Rail Corp. v. RLEA*, 491 U.S. —— (1989), slip op. at 3-8.

6 of the Railway Labor Act, 45 U.S.C. § 156, proposing an agreement that would "ameliorate to the maximum extent possible the adverse impacts which the proposed sale" would have on the employees. Supplemental Short Appendix in 7th Cir. Nos. 89-3265 and 89-3436 [hereinafter, "S.S.A."] at 30.[6] Respondent C&NW objected to bargaining with rail labor over those Section 6 notices,[7] and when the C&NW informed the unions that it would sell its Duck Creek South lines to FRVR, notwithstanding the fact that the Section 6 notices were unresolved, rail labor threatened to strike.

Respondent C&NW reacted to that strike threat by seeking an injunction to bar rail labor from striking and on March 16, 1988, the United States District Court for the Northern District of Illinois issued a preliminary injunction enjoining petitioners from striking the C&NW over its sale of the Duck Creek South lines to FRVR. That interlocutory order was issued because, in the district court's opinion, the dispute over whether the C&NW could sell its rail lines and effect its employees during the bargaining process raised a "minor dispute" within the exclusive jurisdiction of the adjustment boards under

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[6] Rail labor served several sets of Section 6 notices on the C&NW. The first, served by several petitioners beginning in October 1987 *before* the C&NW had entered into its sale agreement in this case, proposed an agreement that would require the C&NW to obtain a commitment from any purchaser of its line to hire the affected C&NW employees and assume their collective bargaining agreements. S.S.A. at 31. The second set was served in February 1988 and proposed an agreement which would provide monetary benefits to C&NW employees affected by the sale and modifications of seniority, where appropriate. S.S.A. at 34. And the third set, served after the national moratorium clause expired on April 1, 1988, essentially repeated the second set.

[7] As relevant here, respondent C&NW asserted that rail labor's Section 6 notices were improper because they sought to "usurp matters reserved to managerial prerogative" and were "preempted" by the Interstate Commerce Commission's jurisdiction over line sales. S.S.A. at 41.

Section 3 of the Railway Labor Act, 45 U.S.C. § 153. S.S.A. at 9-11. That interlocutory injunction was affirmed on appeal (*C&NW v. RLEA*, 855 F.2d 1277) and on November 28, 1988, this Court denied rail labor's petition for a writ of certiorari to review that decision. 488 U.S. 966.[8] Shortly after the petition for a writ was denied, the C&NW sold its 208 mile lines to FRVR and affected approximately 170 employees.[9]

After it sold its rail lines, respondent C&NW returned to the district court and asked that the preliminary injunction be made permanent. According to the C&NW, the court's earlier finding that the dispute over whether the C&NW could sell its rail lines while the Section 6 notices were pending raised a minor dispute, meant that the federal courts lacked jurisdiction over petitioners' counterclaim to enforce the Railway Labor Act's bargaining and status quo commands, and that rail labor should be enjoined permanently from striking over that dispute. Additionally, the C&NW asked the district court to define the issue that was to be submitted to the adjustment boards as the "minor dispute." [10]

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[8] Shortly after this Court denied that petition for a writ of certiorari, a Special Board of Adjustment in another case issued an arbitration award rejecting a contractual interpretation similar to that raised by the C&NW. Rail labor then filed a petition with this Court to rehear their petition; that request for rehearing was denied on January 23, 1989. 488 U.S. 1051 (1989).

[9] On September 21, 1988, Justice Stevens issued an order staying the strike injunction pending consideration of rail labor's petition for a writ of certiorari. Respondents had planned to consummate the sale but held off doing so until that stay was dissolved when the petition was denied on November 28, 1988.

[10] In October 1988, the C&NW and the unions entered into an agreement establishing a Special Board of Adjustment under Section 3 Second of the Act, 45 U.S.C. § 153 Second, to resolve the contract interpretation issue which the C&NW claimed in 1988 raised the minor dispute—*i.e.*, did the existing agreements, as applied in the past, *authorize* the C&NW to abolish jobs, once it sold its rail lines, without first bargaining over the Section 6 notices. S.S.A. at 72. After another Special Board of Adjustment rejected

Rail labor opposed both requests by the C&NW. First, petitioners argued that the dispute between the parties that was being called a "minor dispute" was actually one over the scope of the Act's status quo obligation, a dispute over which the adjustment boards have no jurisdiction. Additionally, petitioners asserted that the earlier, albeit erroneous, finding that there was an arguable contractual-interpretation dispute over whether the collective bargaining agreements *authorized* the C&NW to sell its rail lines and effect its employees before it resolved the dispute raised by the unions' Section 6 notices, did not require a correlative finding that the federal courts lacked jurisdiction over rail labor's efforts to enforce the Act's bargaining and status quo commands. Instead, rail labor argued, if the contract interpretation issue would conclusively resolve the "dispute" (which was never the case here), then the court should stay any further consideration of the complaint to enforce the Act's bargaining command until the adjustment board interpreted the agreements and either proved or rejected the carrier's contractual defense to rail labor's complaint. And second, rail labor asserted that the district court should not define the issue to be submitted to the adjustment board because the carrier had entered into an agreement with petitioners on October 25, 1988, to establish a Special Board of Adjustment under Section 3 Second of the Act, 45 U.S.C. 153 Second, and gave that Board the authority to decide, as the C&NW first claimed,

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a similar claim under identical contractual provisions with another railroad, the C&NW asserted that the issue to be arbitrated was now whether the existing agreements and "attendant past practices" "apply or extend to effects on employees" from the line sale. S.S.A. at 73. And finally, after this Court issued its decision in *Pittsburgh & Lake Erie R. v. RLEA*, 491 U.S. —— (1989), the C&NW asserted that the issue to be resolved by the adjustment boards was now simply whether the carrier, in selling its rail lines and abolishing jobs, violated any express or implied agreement with the unions. C&NW Brief in 7th Cir. Nos. 89-3265 and 89-3436 at 47.

whether the collective bargaining agreements authorized that carrier to sell and effect its employees before bargaining over the Section 6 notices. S.S.A. at 69-72.[11]

B. The District Court's Decision

On October 10, 1989, the district court entered a Memorandum Opinion and Order, accompanied by a separate judgment, concluding that the dispute between rail labor and the C&NW was "an arbitrable minor dispute." App. B at 34a. The court went on to grant the C&NW's motion for a permanent injunction, but did not issue a separate injunctive order setting forth "the act or acts sought to be restrained" as required by Rule 65(d), Fed. R. Civ. P., and, rail labor submits, by Section 9 of the Norris-LaGuardia Act, 29 U.S.C. § 109.[12] The court also dismissed rail labor's counterclaim to enforce the Railway Labor Act's bargaining and status quo commands and defined the issue to be arbitrated before the adjustment boards. App. B at 32a-34a.

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[11] Rail labor has not argued that the sale and its impact on employees violated any agreements with the unions. Rather, rail labor has consistently maintained, notwithstanding the appellate court's erroneous speculation to the contrary (App. A at 21a-22a), that the collective bargaining agreements were silent on sales—line sales were neither authorized nor prohibited by the agreements—and that the unions had served their Section 6 notices in this case for the express purpose of placing the subject of line sales under the scope of the agreements. *See*, App. D at 51a-52a.

[12] During the oral argument before a panel of the Seventh Circuit, the court raised the issue of that court's jurisdiction to hear the appeal and cross-appeal in light of the fact that the injunction was not set forth in a separate document. To avoid any question as to jurisdiction, the parties then asked the district court to enter such a separate injunctive order, which the district court did on July 2, 1990. App. C at 27a. Petitioners immediately noted an appeal from that order to the Seventh Circuit, and that appeal is still pending as 7th Cir. No. 90-2496. This petition seeks to bring that case before this Court as well, again to avoid any question as to jurisdiction. *See*, App. A at 7a-11a.

According to the district court, this Court's decision in *Pittsburgh & Lake Erie*, and in particular its holding that the Pittsburgh & Lake Erie had to bargain with the unions over labor's Section 6 notices dealing with the *effects* of the sale on employees (*Pittsburgh & Lake Erie*, slip op. at 19-20), did not require a reconsideration of the "minor" dispute conclusion here, because "nothing in the Supreme Court's opinion in *P&LE* suggested that anything other than total divestment from the railroad industry would result in a 'major' dispute." App. B at 32a. The court then addressed the C&NW's argument as to the issue to be arbitrated and concluded that the carrier's latest framing of the issue—*i.e.*, "whether or not C&NW violated its express or implied agreements" with the unions (App. B at 32a)—"would narrow the issue before the . . . [adjustment boards] out of existence because RLEA does not argue that there were any agreements regarding C&NW's right to sell part of its rail holdings." According to the district court (*id.*):

> The issue to be arbitrated is not the narrow one of whether or not C&NW violated any agreement with [the unions]. . . . The issue to be arbitrated is what should happen to the C&NW employees who are affected by the line sale. The [adjustment board] . . . is to decide what treatment, in terms of pay (severance or otherwise), seniority rights, benefits rights, transfer rights, etc., the employees of C&NW (who are affected by the line sale) are entitled to in terms of contractual provisions and attendant past practices.

The district court then added that (App. B at 34a):

> As to the § 6 notices, both sides seek a declaratory judgment as to the validity (or invalidity) of the § 6 notices [the unions] . . . served on C&NW. We find this dispute to now be moot. Section 6 notices invoke the major dispute procedures of the RLA. We have already decided that this is a minor dispute. C&NW thus need not bargain with RLEA over the

line sale. Rather, both sides must submit to arbitration.

Rail labor appealed to the Seventh Circuit from the judgment dismissing the counterclaim and from the injunction, and the C&NW cross-appealed from the court's definition of the issue to be arbitrated.[13] Both parties invoked the appellate court's jurisdiction under 28 U.S.C. § 1291.

C. Court of Appeals' Decision

Although the Seventh Circuit affirmed the permanent injunction and the dismissal of rail labor's counterclaim to enforce the Railway Labor Act's bargaining and status quo obligations, the appellate court did so for reasons that bear virtually no resemblance to the reasoning of the district court. First, while the district court, following the approach of the earlier Seventh Circuit opinion,[14] had concluded that the unions' Section 6 notices did not create a bargaining obligation because the "dispute" between rail labor and the C&NW was one over contract interpretation subject to the exclusive jurisdiction of the adjustment boards, the Seventh Circuit recognized that

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[13] On appeal, rail labor did not defend the district court's description of the issue to be arbitrated because the unions asserted that the issue framed by the district court was in essence the major dispute raised by the Section 6 notices and that Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First, provided that this issue could be arbitrated *only* if both sides agreed, which was not the situation in this case. App. A at 23a.

[14] This approach to the major-minor dispute classification problem, which assumes that the classifications are mutually exclusive, has been applied to line sale cases by the Second and Third Circuits (*General Committee of Adjustment v. CSX R.*, 893 F.2d 584 (3rd Cir. 1990); *CSX Transportation, Inc. v. UTU*, 879 F.2d 990 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 720 (1990)) where, like the Seventh Circuit in its first consideration of this case, the courts concluded that there was no bargaining obligation because the dispute was a minor one. The Eighth Circuit in *RLEA v. C&NW*, 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 3237 (1990), applied the same approach but concluded that the dispute was a major one because there was a bargaining obligation.

the C&NW had an obligation to bargain over the *effects* of the sale on employees. App. A at 15a. However, the appellate court, expanding this Court's decision in *Pittsburgh & Lake Erie*, concluded that the C&NW was correct in refusing to bargain over the unions' proposals to limit its managerial prerogative to sell a *portion* of its rail system. App. A at 13a-14a. According to the appellate court, there was *no meaningful distinction* between a decision to leave the railroad business entirely, as in the *Pittsburgh & Lake Erie* case, and the decision to sell a little-used line, as in this case; indeed, the Seventh Circuit said, that distinction is but a "messy" detail which, if allowed to be controlling, would lead to absurd results. App. A at 14a. Since the C&NW did not deny its duty to bargain over "effects," rail labor was not entitled to a bargaining order, for "no order is needed to compel what is already being done . . . ." App. A at 16a.[15]

Even though the C&NW had an obligation to bargain over the effects of the sale, the district court was correct, the Seventh Circuit held, in labeling the dispute at bar as being a "minor dispute" and in permanentnly enjoining rail labor from striking over the railroad's actions. First, in a most novel approach to the distinction between major and minor disputes, the appellate court concluded that the unions' Section 6 notices did not raise a major dispute because the C&NW had not *refused* to

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[15] The court went on to note that the parties are bargaining over "effects" in "perfect good faith on the part of both parties, so far as we are able to determine." App. A at 16a. That factual statement is incorrect, for rail labor established that the conferences between the parties over the Section 6 notices ceased in September 1988 when the C&NW invoked the National Mediation Board's mediatory jurisdiction under Section 5 First of the Act and that since then, because of the dispute over the validity of the Section 6 notices, no mediation has occurred. RLEA Statement of Material Facts at 3, ¶ 3, filed March 31, 1989; Declaration of Counsel at 3, ¶ 7, executed November 18, 1988. Mediation has still not been scheduled.

bargain over the effects of the line sale on the employees. App. A at 15a. Then, the court assumed that what rail labor agreements "do not forbid, either explicitly or implicitly . . . , the railroad is allowed to do as a matter of contract; and what the railroad is allowed to do *is* . . . the status quo, even if the railroad has not been doing it." App. A at 16a (emphasis in original). Since rail labor acknowledged that the collective bargaining agreements, both written and implied, did not prohibit the C&NW from selling its lines, the sale and its impact on employees, the Seventh Circuit held, did not violate the C&NW's status quo obligation.[16] Moreover, since the "policy behind the compulsory-arbitration provisions of the Railway Labor Act is to prevent strikes over matters regulated by a binding collective bargaining agreement" (App. A at 24a), the district court was correct in enjoining rail labor permanently from striking over the sale and its impact on employees, because those actions were, in the Seventh Circuit's view of rail agreements, *permitted* by the contracts. App. A at 24a-25a. The fact that there was no disagreement over the interpretation of agreements to be arbitrated did not, according to the Seventh Circuit, change its conclusion that this case presented an enjoinable strike-threat over a minor dispute.

On August 21, 1990, the court denied a petition for rehearing and a suggestion for rehearing *en banc* (App. E at 62a), and this petition for a writ of certiorari has followed.

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[16] Alternatively, the Seventh Circuit stated that even if it was wrong in concluding that the status quo is defined by the agreements, the unions would still not prevail because a sale of a rail line does not change rates of pay, rules or working conditions, and the "practice of abandoning unwanted rail lines under standards established by the Interstate Commerce Commission embraced the practice of selling unwanted rail lines under standards established by the same body." App. A at 19a.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the proper interpretation of the Railway Labor Act's bargaining and status quo obligations, which have been decided by the Seventh Circuit in a way that does what this Court declined to do in *Pittsburgh & Lake Erie R. v. RLEA*, 491 U.S. —— (1989), and that is to overrule *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960) and *Detroit & Toledo Shore Line R. v. UTU*, 396 U.S. 142 (1969). Since the Act's bargaining and status quo obligations are so important to the proper administration of the Railway Labor Act and to the primary goal of that Act, which is to resolve labor disputes by collective bargaining so as to avoid interruptions to commerce, this Court should review the Seventh Circuit's decision, which concluded that this Court's interpretation of the Railway Labor Act's bargaining obligation in *Telegraphers* and its interpretation of the Act's status quo obligation in *Detroit & Toledo* are no longer good law.

In addition, the Seventh Circuit has added one more decision to what is fast becoming a hopeless morass of platitudes which the lower courts are applying since *Consolidated Rail Corp. v. RLEA*, 491 U.S. —— (1989), to center upon the misleading question of whether a dispute over what actions a carrier may take during the statute's status quo period is a "major" or a "minor dispute," while ignoring the real issue, which is the statutory construction question as to the scope of the Act's status quo command. This case shows the absurd lengths to which courts can go while traveling down this useless classification path. Because of the utter confusion that currently exists among the circuits on the proper relationship between the Act's major dispute resolution procedures and a carrier's claim of a contractual right to act during the bargaining period, this Court should grant the writ in this case and give the lower courts the needed guidance on this important issue.

I. THIS CASE PRESENTS IMPORTANT ISSUES OF FEDERAL LAW, FOR THIS COURT HAS OFTEN OBSERVED THAT THE PROPER INTERPRETATION OF THE RAILWAY LABOR ACT'S BARGAINING AND STATUS QUO OBLIGATIONS ARE CRUCIAL TO THE EFFECTIVE ADMINISTRATION OF THAT ACT

This Court has observed before that the duty imposed upon both carriers and employees by Section 2 First of the Railway Labor Act "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes" (45 U.S.C. § 152 First), is the "heart" of this important labor statute. *E.g., Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 574 (1971). That duty is complemented and made effective by the Act's status quo obligation, which is triggered whenever the bargaining obligation is invoked and requires the parties, including the rail carrier, to preserve and maintain unchanged during the bargaining process "the conditions out of which the dispute arose." *E.g.*, 45 U.S.C. § 160. That status quo obligation, this Court has noted, is "central" to the Act's design. *Detroit & Toledo Shore Line R. v. UTU*, 396 U.S. 142, 150 (1969). Indeed, as this Court stated in *Detroit & Toledo*, in those situations, such as the case at bar, where the unions invoke the Act's bargaining obligation to place under contract a subject that was previously uncovered, "it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled." 396 U.S. at 155.

Less than ten (10) years ago, apparently in the spirit of deregulation, the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] altered its long-standing policy of requiring a railroad, planning on selling a portion of its system to a newly formed railroad for continued operations, to provide a "fair arrangement" to protect the interests of its employees. *Knox &*

Kane R.—Exemption, 366 I.C.C. 439 (1982). Ever since that decision, the railroads have "embraced" the practice of selling marginal lines to short line and regional operators, most of which are newly-formed carriers.

Although those line sale agreements typically contain provisions that deal with employee interests—such as whether the new operator must hire the selling carrier's employees and assume the existing collective bargaining agreements [17]—the carriers have almost uniformally refused to bargain with rail labor for an agreement that would specify what provisions the selling carrier must, or should, include in the sales agreement to protect the employees' job opportunities. According to the carriers, rail labor may not rely upon the Railway Labor Act's major dispute resolution procedures (*i.e.*, §§ 2 First and 6, 45 U.S.C. §§ 152 First and 156) to require them to bargain for such agreements because, the carriers assert, the subject matter of employee protection has been "preempted" by the Interstate Commerce Act, 49 U.S.C. 10101, *et seq.*, with its grant of "exclusive" jurisdiction to the ICC to regulate line sales, and because "an employer's sale of its assets is a management prerogative to which the duty to bargain does not apply." Emergency Board No. 219 (created by Executive Order No. 12,714, May 3, 1990), Carriers' Ex. 41 at 9.

As a result of the carriers' refusal to bargain over the unions' Section 6 notices to limit the railroads' managerial prerogatives, this dispute is still unresolved, and indeed, appears no closer to a mutually agreeable resolution than five (5) years ago when the unions served their

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[17] Indeed, in one such sale agreement, the selling railroad included, as part of the sale price, a bounty of $45,000 for each "protected employee" of the seller who resigned from the selling carrier in order to take a job with the buyer. The buyer was expected to, and did, implement that bounty by requiring employees to resign from the selling carrier before they could accept a job with the buyer doing the same work that they did before the sale. *See Soo Line R. v. Wisconsin Central Ltd.*, D. Minn. Civil Action No. 4-88-900.

first Section 6 notices on this dispute.[18] Moreover, as this Court is well aware, this dispute, including the carriers' assertion that they can sell their rail lines without first bargaining, has been the subject of numerous federal court decisions, which have often been decided in conflicting ways. *See, Pittsburgh & Lake Erie R. v. RLEA*, 491 U.S. —— (1989). Unfortunately, because the lower federal courts have not been consistent in their treatment of the issues raised by the carriers' actions, and because the Seventh Circuit's decision in this case has, in effect, overruled this Court's earlier decisions in *Detroit & Toledo* and *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), the volume of litigation on this subject will not decrease. Indeed, it is reasonable to expect that this volume will increase, first because of the carriers' refusal to bargain over the national Section 6 notices now before Emergency Board No. 219, and second because it is expected that the carriers will continue to sell marginal lines while this window of opportunity remains open.[19]

This Court recognized that the Railway Labor Act issues presented by this litigation raised important issues when it granted the Pittsburgh & Lake Erie Railroad's petitions for writs of certiorari in 1988. 488 U.S. 965. However, while that decision did clarify and narrow the issues in dispute, it has not resolved the crucial questions concerning the scope of the Railway Labor Act's bargain-

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[18] Rail labor served Section 6 notices on virtually all of our nation's railroads shortly after April 1988 requesting agreements similar to those proposed by the first Section 6 notices in this case, and those notices have been placed before Emergency Board No. 219 for investigation under Section 10 of the Railway Labor Act.

[19] Recently, the president of the American Short Line Railroad Association, William E. Loftus, has been quoted as predicting that by the year 2000, short line and regional operators will be operating 25% of the nation's route miles, whereas today they are operating approximately 14%. Chicago Tribune, July 29, 1990, Business Section at 3.

ing and status quo obligations. This is so because, although the *Pittsburgh & Lake Erie* Court held that a railroad need not bargain over its decision to leave the railroad business *entirely*, nor delay the implementation of that decision while bargaining over the impact of its decision on employees, this Court was careful to note that it was deciding the "extreme case" in which the railroad has decided "to retire from the railroad business." *Pittsburgh & Lake Erie*, slip op. at 16 n.17 (continued). That is clearly not the case when, as here, the carrier sells only 208 miles of a 6,000 mile system. Since the *Pittsburgh & Lake Erie* court did not overrule *Telegraphers* or *Detroit & Toledo*, which the Court had to distinguish to reach the result which it did, rail labor has maintained that *Telegraphers* and *Detroit & Toledo* apply to partial line sales. The railroads, however, argue that the effect of *Pittsburgh & Lake Erie* was to overrule *Telegraphers* and *Detroit & Toledo*, despite this Court's limiting language, and the Seventh Circuit has accepted that argument here. *But see, RLEA v. Chesapeake Western Ry.*, 915 F.2d 116, 120 n.4 (4th Cir. 1990); *see also, RLEA v. C&NW*, 890 F.2d 1024, 1025-26 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 3237 (1990).

In order to avoid any further delay in the resolution of this dispute over the proper interpretation of the Railway Labor Act, which clearly transcends the line sale controversy and applies to rail labor and airline labor issues generally (*see*, 45 U.S.C. § 181), it is important that this Court finish the work which it began in *Pittsburgh & Lake Erie* and decide whether the sale of an entire line is an *extreme case*, as this Court repeatedly emphasized in that decision, or whether it is a typical case where any sale or business closure, no matter how small, is involved, to which *Telegraphers* and, *a fortiori*, *Detroit & Toledo* do not apply.

II. THE SEVENTH CIRCUIT HAS DECIDED THESE IMPORTANT QUESTIONS CONCERNING THE RAILWAY LABOR ACT IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS IN *TELEGRAPHERS, DETROIT & TOLEDO* AND *PITTSBURGH & LAKE ERIE*

This Court has previously addressed the issue of whether a rail carrier may be required to bargain over a union's proposal to limit its managerial prerogative to close little-used portions of its business and, as a result, abolish jobs. Indeed, it did so in 1960 when it reviewed and reversed a decision by the Seventh Circuit, involving the C&NW's predecessor, where the appellate court had held, as did the Seventh Circuit in this case, that the union's Section 6 notice represented "'an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations.'" *Telegraphers*, 362 U.S. at 336, *quoting*, 264 F.2d 254, 259 (7th Cir. 1959). In rejecting the Seventh Circuit's managerial prerogative reasoning, this Court examined the history of bargaining in the rail industry and Congress' consistent recognition that employees should be protected from corporate restructurings by railroads (362 U.S. at 336-38), and concluded that (362 U.S. at 338):

> In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.

In *Pittsburgh & Lake Erie*, as it did in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686-87 n.23 (1981), itself, this Court recognized that there were important distinctions between the Railway Labor Act and the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, which cautioned against striking the same balance in both Acts between the impact that requiring an employer to bargain will have on its managerial prerogative to run its business as it sees fit, and the need for such bargaining to promote labor stability. *Pittsburgh & Lake Erie*, slip op. at 15 n.17. It was those distinctions, including the "enlarged scope of mandatory bargaining under the RLA" (*id.* at 16 n.17 (continued)), which led this Court to reject the application of *Telegraphers* to the partial closing issue raised in *First National Maintenance*. 452 U.S. at 686-87 n.23. Moreover, it was those differences that required this court to distinguish the factual situation presented in *Pittsburgh & Lake Erie* from *Telegraphers* by emphasizing that the later case involved the "extreme situation" where the railroad "sought to sell all its lines and go out of business." Slip op. at 16 n.17 (continued). And it was because of that critical factual difference present in the *Pittsburgh & Lake Erie* case that this Court decided not "to extend *Telegraphers* to a case in which the railroad decides to retire from the railroad business." *Id.*

In the case at bar, however, the Seventh Circuit thought that the distinction between a partial closing or sale and an entire line closing or sale was "a detail, and a messy one, since it would be absurd to make a railroad bargain over the sale of 99 percent of its lines but not over the sale of 100 percent." App. A at 14a. Consequently, it read *Pittsburgh & Lake Erie* as extending *First National Maintenance* to the Railway Labor Act. App. A at 13a. *Telegraphers*, the Seventh Circuit opined, simply stood for the proposition that a railroad *could*, but did not

have to, bargain over a managerial prerogative.[20] App. A at 12a.

After narrowing the scope of bargaining, the Seventh Circuit then proceeded to adopt Justice Harlan's dissent in *Detroit & Toledo* as being the proper construction of the Act's status quo obligation—*i.e.*, the status quo requires a railroad to preserve and maintain unchanged only those working conditions where, "in the context of the relationship between the principals, taken as a whole, there is a basis for implying an understanding on the particular practice involved." 396 U.S. at 160 (Harlan, J., dissenting). According to the Seventh Circuit (App. A at 16a), this view of the status quo as being defined by the parties' written and implied agreements *only*, was justified by this Court's footnote in *Pittsburgh & Lake Erie*, where this Court declined to extend *Detroit & Toledo* "to the decision of P&LE to go out of business." That conclusion, petitioners submit, is clearly unwarranted, for this Court recognized in that very footnote in *Pittsburgh & Lake Erie* that the status quo obligation froze those working conditions "that have never been the subject of an agreement, *expressed or implied*, and that, if no notice of changes had been served by the union,

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[20] Even if this limited reading of *Telegraphers* were correct, and we submit it clearly is not, the result reached by the Seventh Circuit would still be inconsistent with *Telegraphers*, for the appellate court then proceeded to enjoin a strike over the railroad's refusal to bargain about a subject which the court held was permissive, but yet this Court held in *Telegraphers* that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, barred such an injunction. The Seventh Circuit, we submit, cannot have it both ways. Either, *Telegraphers* stands for the proposition that a union may compel bargaining over employee protection in a partial closing, or it stands for the proposition that a carrier, which refuses to bargain over a permissible subject of bargaining, cannot obtain an injunction because the Norris-LaGuardia Act has withdrawn the court's injunctive jurisdiction. *See*, 29 U.S.C. § 108; *Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R.*, 321 U.S. 50, 57-58 (1944).

could be changed by the carrier without any bargaining whatsoever." Slip op. at 14 n.15 (continued) (emphasis added).

As we have asserted above, whether or not the Seventh Circuit is correct in holding that *Pittsburgh & Lake Erie* has overruled *Telegraphers* and *Detroit & Toledo* are important questions of federal law that should be resolved by this Court and not, we submit, by a panel of the Seventh Circuit. Moreover, these issues take on a greater importance when the Seventh Circuit's erroneous conclusion (App. A at 16a, 21a) that rail labor agreements *permit*, as a matter of contract, what they do not forbid, either expressly or impliedly, is added to the equation. As the result reached by the Seventh Circuit in this case shows, equating the status quo obligation to preserving contractual obligations only, means that every dispute over what actions a carrier may take during the bargaining period raises a "minor" dispute to which the status quo does not apply. In short, the Seventh Circuit's decision has eliminated the status quo obligation in those cases where this Court has said "it is absolutely essential that the status quo provisions of the Act apply to that [non-agreement] working condition if the purpose of the Act is to be fulfilled." *Detroit & Toledo*, 396 U.S. at 155.

III. THE SEVENTH CIRCUIT'S CONCLUSION THAT A STRIKE BY RAIL LABOR OVFR THE LINE SALE OR ITS IMPACT ON EMPLOYEES WOULD BE AN IMPERMISSIBLE STRIKE OVER A MINOR DISPUTE, RAISES AN ISSUE WHICH URGENTLY NEEDS TO BE RESOLVED BY THIS COURT—NAMELY, DOES A CARRIER'S CLAIM OF A RIGHT TO TAKE A DISPUTED ACTION DURING THE STATUS QUO PERIOD RELIEVE THE CARRIER OF ITS STATUS QUO OBLIGATION

Beginning with the C&NW's alternative challenge to rail labor's complaint to enforce the Railway Labor Act's bargaining and status quo obligations in the litigation

which resulted in the Eighth Circuit's decision in *RLEA v. C&NW*, 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 3237 (1990), the rail carriers, including the C&NW in this case, have argued that rail labor's enforcement complaints raise "minor" disputes, subject to the exclusive jurisdiction of the adjustment boards under Section 3 of the Railway Labor Act, 45 U.S.C. § 153. As this case shows, the carriers' argument is essentially that the status quo includes their contractual rights, and thus any dispute over what actions they may take during the status quo period must necessarily raise a dispute over the interpretation of their contractual rights which only an adjustment board may resolve. App. D at 51a-52a.

This argument, which has been made in line sale cases before the Second, Third, Fourth, Seventh and Eighth Circuits, has resulted in conflicting decisions which cannot be reconciled with each other and, more important, with the dispute resolution procedures of the Railway Labor Act.

For example, the Second and Third Circuits, and the Seventh Circuit in its first consideration of this case, concluded that the carriers' claim of a contractual right to sell and to abolish jobs during the bargaining period raised a minor dispute and that, therefore, there was no bargaining obligation even as to the effects of the sales on employees. *General Committee of Adjustment v. CSX R.*, 893 F.2d 584 (3rd Cir. 1990); *CSX Transportation, Inc. v. UTU*, 879 F.2d 990 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 720 (1990); *C&NW v. RLEA*, App. D. Rail Labor's arguments in those cases, that the unions' Section 6 notices raised a "major" dispute, were rejected by those courts because, they asserted, the service of a Section 6 notice did not transform a minor dispute into a major one. *E.g.*, 879 F.2d at 1000. Additionally, those courts concluded that having characterized the dispute as being minor, it would remain a

minor dispute forever, even if, as occurred in the Second Circuit case, the adjustment board rejected the carrier's claimed contractual right. *E.g.*, 879 F.2d at 1004-05.

The Eighth Circuit, on the other hand, rejected the minor dispute argument. According to that court, this Court held that the dispute raised by the unions' Section 6 notices in *Pittsburgh & Lake Erie* raised a major dispute, and that holding applied there. 890 F.2d at 1026. And as the court went on to note (*id.*):

> The union is not seeking an interpretation of the express or implied terms of the collective bargaining agreement nor is it seeking a ruling that a past practice should be enforced. Rather, it is seeking to negotiate over the effects of a sale on those C&NW employees who are affected by it.

In the Fourth Circuit, however, the court divided the dispute into two parts. First, it concluded that the dispute "over prospective contract rights is major." *RLEA v. Chesapeake Western Ry.*, 915 F.2d 116, 120 (4th Cir. 1990).[21] But then, it concluded that the dispute over what actions the carrier could take during the major dispute process was "minor," for, as the court said (*id.*; emphasis in original):

> The Achilles' heel of the Unions' argument is that the railroad's actions are "arguably justified" by the *existing* agreement. The service of a § 6 notice and the beginning of bargaining over the proposed changes does not convert a minor dispute into a major one.

And finally, in this case, the Seventh Circuit acknowledged that the unions' Section 6 notices raised a bargainable issue, but not a "major dispute" because the railroad has not refused to bargain over the effects of the sale on its employees. App. A at 15a. The court then proceeded

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[21] Rail labor is preparing a petition to this Court for a writ of certiorari to review that case.

to rule that the dispute was a minor dispute because the C&NW relied upon its right, which was not restricted by the collective bargaining agreements, to sell and to abolish jobs. App. A at 20a-21a. According to the Seventh Circuit, the "policy behind the compulsory-arbitration provisions of the Railway Labor Act is to prevent strikes over matters regulated by a binding collective bargaining agreement." App. A at 24a. Consequently, the unions must be enjoined from *ever* striking the C&NW over the sale *or its impact on employees*, even if, as in this case, there was no contractual interpretation issue to be submitted to arbitration *and* the unions had a right to bargain over the effects of the sale on employees.

In short, the circuits are hopelessly at odds over the relationship between the duties which a valid request to bargain invokes, and a carrier's right in the absence of such a bargaining request to act on its interpretation of its agreements and their restrictions. In the Second and Third Circuits, the contractual-right claim trumps the bargaining and status quo obligations totally. In the Fourth, it eliminates the status quo requirement. And in the Seventh, it eliminates the unions' right to exercise self-help once the bargaining process is completed. It is only in the Eighth Circuit that the right to bargain and the strike leverage remain.[22]

This conflict in the circuits extends past line sale cases and clearly applies to any attempt by rail labor to bring under the coverage of an agreement a non-agreement practice, where the unions believe the need to include that subject within the scope of the arguments is serious enough to warrant the service of a Section 6 notice. If the Railway Labor Act is to continue to serve its purpose of avoiding labor strife by providing meaningful collec-

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[22] However, as rail labor argued in its unsuccessful petition for a writ in that case (Sup. Ct. No. 89-1527), that court misread the scope of the Act's bargaining and status quo obligations and, in effect, deprived the employees and the public of the bargaining leverage which the status quo creates.

tive bargaining to resolve disputes over changes to employment terms, it is important that all parties and the lower federal courts fully understand the parameters of the obligations that the service of a Section 6 notice invokes.

CONCLUSION

This Court should grant the writ to bring both the decision of the Seventh Circuit and the case in 7th Cir. No. 90-2496 before this Court for review.

Respectfully submitted,

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Date: December 19, 1990

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 89-3265, 89-3436

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Plaintiff-Appellee, Cross-Appellant,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Defendants-Appellants, Cross-Appellees.

Argued June 12, 1990

Decided July 17, 1990

Before POSNER, EASTERBROOK, and MANION, Circuit Judges.

POSNER, Circuit Judge.

These appeals, which pit the owner of a large midwestern railroad against the unions that represent its workers, present intricate questions under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, as well as a difficult question of appellate jurisdiction.

Like many American railroads, the C & NW in recent years has been busy discontinuing service on unprofitable lines. Until 1986 it did this by abandoning lines pursuant to the standards for abandonment established by the Interstate Commerce Commission; among these standards

is the requirement that the abandoning railroad "protect" the workers adversely affected by the abandonment by giving them generous severance pay. Through abandonments the C & NW shrank to half its former size and laid off 6,000 employees. But beginning in 1986 the railroad took a different tack, selling abandoned lines (however cheaply) rather than abandoning them, and doing so under new procedures that not only enabled the ICC's approval for the transaction to be obtained swiftly but also, and much more important, excused the railroad from having to protect employees affected by the sale. *Ex Parte No. 392*, 1 I.C.C.2d 810, 815 (1985), review denied without opinion under the name *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C.Cir. 1987). See generally *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, —— U.S. ——, 109 S.Ct. 2584, 2590-91, 105 L.Ed.2d 415 (1989).

The unions had not claimed that the abandonments violated their collective bargaining agreements, and had not otherwise objected. For in addition to the protective conditions imposed by the ICC in abandonment cases, the collective bargaining agreements protected the seniority rights of the affected employees. An employee laid off by reason of an abandonment could "bump" an employee elsewhere in the C & NW system who had less seniority, provided the senior employee was qualified to perform the junior's job. Unions tend to favor older over younger workers. This is because, for a variety of reasons including the fact that job mobility tends to lessen with age, older workers tend to support unions more strongly than younger workers do. Between bumping rights and severance pay, older workers—especially those near retirement—were well protected against the disemployment effect of line abandonments. But when the C & NW switched from abandonment to sale, this happy picture changed. Gone was the generous severance pay. The senior workers were still protected in their bumping rights, but with the C & NW system shrinking rapidly

there were fewer jobs for either the bumpers or the bumped. Moreover, older workers, with stronger ties to the local community on average than younger ones (which is why older workers tend to have less job mobility), are reluctant to pull up stakes and move to a different geographical area; yet moving will often be necessary to take advantage of bumping rights.

A partially offsetting consideration is that the purchaser of the line may decide to retain the workers who have been working on it. Despite this possibility, the unions were upset when the C & NW abandoned abandonments for sales, and the first thing they did was file a notice under section 6 of the Railway Labor Act, 45 U.S.C. § 156, which provides that "carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions." The notice, as section 6 goes on to provide, obligates the parties to meet and negotiate over the proposed change and, if the negotiations fail, to submit the dispute to mediation. Only after all means to a peaceful resolution have been exhausted may the party who filed the section 6 notice strike, if it is the union, to coerce the other party to comply with its demands, or, if it is the employer, implement the proposed change. The notice that the unions served on the C & NW demanded that the collective bargaining agreements be modified to impose protective conditions on line sales similar to the protective conditions that the ICC imposes on abandonments.

At the time the notice was filed (1987), the C & NW had announced its intention to sell its 208-mile-long "Duck Creek South" line in Wisconsin to another railroad, but had not completed the transaction. Although the C & NW took the position that it was not required to bargain over the right to sell parts of its system, it did meet with the unions' representatives to discuss the effects of the sale on the employees, and that matter is

now in mediation. But it refused to delay the sale's consummation. The unions threatened to strike if the sale was consummated. They argued that consummation would violate the provision of section 6 that during the negotiating process kicked off by the section 6 notice 'rates of pay, rules, or working conditions shall not be altered by the carrier." The railroad then filed this suit. It sought preliminary and permanent injunctive relief against the unions' striking over the Duck Creek South sale, plus an order directing the union to submit the dispute to an adjustment board, which is an arbitral body ordained by the Railway Labor Act.

In support of these requests the railroad contended that the dispute was "minor" rather than "major." These terms are not to be taken in their ordinary sense; they are terms of art in the case law under the Railway Labor Act (they do not appear in the Act itself). *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, —— U.S. ——, 109 S.Ct. 2477, 2479-82, 105 L.Ed.2d 250 (1989); *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n, supra*, 109 S.Ct. at 2589 n. 4; *Air Line Pilots Ass'n v. UAL Corp.*, 874 F.2d 439, 443-44 (7th Cir.1989). It would be more informative to call a major dispute a "modification" dispute and a minor dispute an "interpretation" dispute. But it may be too late to change the terminology.

In any event, a major dispute is a dispute to which section 6 procedures are applicable—a dispute kicked off by the filing of a notice of desire to modify existing collective bargaining agreement. The terminus of such a dispute, if the procedures set forth in section 6 fail to produce agreement between the parties, is a strike. A minor dispute is a dispute "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153 First (i). Hence it is one that can be resolved conclusively by interpretation of the collective

bargaining agreement. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, supra,* 109 S.Ct. at 2481; *General Comm. of Adjustment v. CSX Railroad Corp.,* 893 F.2d 584, 586 (3d Cir.1990). In other words, a minor dispute is one over the interpretation or application of the collective bargaining agreement (for a grievance is merely a complaint that arises under the agreement, *Lancaster v. Norfolk & Western Ry.,* 773 F.2d 807, 814 (7th Cir.1985)), while a major dispute is one in which the carrier or employer wants to change the agreement.

Minor disputes are governed by the procedures for compulsory arbitration established by section 3 of the Act precisely to enable conclusive resolution of interpretive disputes. Compulsory arbitration is the statutory substitute for strikes and other work action by which unions in other industries have often tried to enforce their interpretation of a collective bargaining agreement (in the absence of a no-strike clause), but which are thought unduly disruptive in the transportation industry. Unlike manufacturing industries and even some service industries, the transportation industry does not produce a storable commodity, and so it cannot produce for inventory in anticipation of a strike or accelerate production afterward to make up for lost production during the strike. It is therefore peculiarly vulnerable to a strike.

Agreeing that the dispute over the protective conditions was minor and therefore that the union's only remedy lay with arbitration, the district court granted the preliminary injunction sought by the railroad. We affirmed, *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n,* 855 F.2d 1277 (7th Cir.1988), and the sale of the Duck Creek South line was then consummated. But the lawsuit was not over. The railroad wanted the injunction made permanent, so that it would not expire when the arbitration ended. The parties also disagreed as to how the district judge should

frame the issue for arbitration in the order directing the parties to arbitrate. (Whether the district judge *has* the power to frame the issues for arbitration under the Railway Labor Act is an issue we discuss later.) The railroad wanted the issue to be: Had the Duck Creek South sale violated the collective bargaining agreements? The unions wanted it to be: What entitlements did the former workers on the Duck Creek South line have, in light not only of the provisions of the collective bargaining agreements but also of the railroad's practice, which in the case of abandonments had been to provide generous severance pay, as required by the Interstate Commerce Commission in abandonment cases? Moreover, the unions had filed a counterclaim. In it they sought an injunction to preserve their conception of the status quo and specifically, therefore, to prevent the C & NW from laying off any workers who had not been hired by the purchaser of the Duck Creek South line. They also sought an order that the railroad bargain over the demands in the unions' section 6 notice—which the railroad had been doing in part only, bargaining just over the effects of the sale on the workers and refusing to discuss the propriety of making this or future sales without including protective conditions.

The district court split the difference. The judgment states that "we grant [C & NW's] motion for a permanent injunction and we dismiss RLEA's counterclaim. . . . This dispute will be arbitrated . . ., and we have herein determined the issue to be arbitrated." The "herein" refers to the statement in the district court's accompanying opinion that the arbitrators are "to decide what treatment, in terms of pay (severance or otherwise), seniority rights, benefit rights, transfer rights, etc., the employees of C & NW (who are affected by the line sale) are entitled to in terms of contractual provisions and attendant past practices." The unions appeal from the grant of the permanent injunction to the railroad and

the dismissal of their counterclaim, and the railroad cross-appeals, challenging the terms on which the judge referred the matter to arbitration.

The question of appellate jurisdiction is this: Rule 65(d) of the Federal Rules of Civil Procedure requires that an order granting an injunction set forth the terms of the injunction and *not* do so by reference to a complaint or other document. The purpose is to provide a solid foundation for any subsequent proceeding to enforce the injunction, as by a motion to hold the defendant in contempt. The judgment that the district court issued, quoted above, does not comply with Rule 65(d), because it does not spell out the terms of the injunction but instead refers the reader to the accompanying opinion. If the consequence is that there is no injunction in force, then at least insofar as the unions are seeking to appeal from the grant of an injunction (for that is not all they are seeking to appeal from) we lack jurisdiction because then there is no case or controversy as these words are used in Article III of the Constitution.

The point is not that Rule 65(d) is jurisdictional in the sense that its requirements are nonwaivable, so that any failure to comply with those requirements would make the injunction a nullity even if no party had ever objected. The rule is not jurisdictional in that sense, *Gunn v. University Comm. to End War in Viet Nam*, 399 U.S. 383, 389 n. 4, 90 S.Ct. 2013, 2017 n. 4, 26 L.Ed.2d 684 (1970), although what is true is that a district judge has not only the power but also the duty to refuse to enter a defective injunction even if neither party objects. An injunction imposes burdens on the court that issues it and potentially affects the rights of third parties; on both grounds the court has a duty independent of the desires of the parties to assure that the injunction is proper. *Okaw Drainage District v. National Distillers & Chemical Corp.*, 882 F.2d 1241, 1248 (7th Cir.1989); *Parks v. Pavkovic*, 753 F.2d 1397, 1404 (7th

Cir.1985). The point, rather, is that if by reason of not complying with Rule 65(d) the order issued by the district court is not an injunction at all, it places the defendant under no obligations; and an order that is not actually or at least potentially coercive (whether an injunction, an award of damages, a prison sentence, or any other binding directive, including—the most attenuated example—a declaratory judgment) does not impose the sort of tangible harm that Article III requires for standing to seek judicial relief, including relief in the form of an appellate judgment. It is just an advisory opinion. By this analytic route we see that a violation of Rule 65(d) can compel the dismissal of an appeal. *Azeez v. Fairman*, 795 F.2d 1296, 1297 (7th Cir.1986); *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 527-28 (7th Cir. 1988); *Bates v. Johnson*, 901 F.2d 1424 (7th Cir.1990).

But we think there is an enforceable injunction here. This is not primarily because the district judge's memorandum opinion, which states in spare but sufficient detail the terms of the injunction, is captioned "Memorandum Opinion *and Order*" (emphasis added) and states in its conclusion: "we grant [C & NW's] motion for a permanent injunction." This is compliance with the letter of Rule 65(d), which refers to orders rather than to judgments, but not with the spirit. When Rule 65(d) is read in conjunction with Rule 58, which requires that any nonmonetary as well as any monetary relief granted by the district court be set forth in a judgment order separate from the court's opinion, it becomes apparent that the terms of the injunction should appear in the Rule 58 order as well. Nevertheless, the form of the opinion in this case comes so close to satisfying the requirements of Rule 65(d) that it is possible to regard the violation of that rule as technical rather than substantial, bearing in mind that the requirement of a separate judgment order in Rule 58 is not itself jurisdictional. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978).

Our second and decisive point is that a *preliminary* injunction had been issued, had been appealed without its efficacy being questioned, and had been upheld by this court; and the preliminary injunction contained the identical terms, except of course with regard to duration (it would expire when the arbitration panel issued its award), that the C & NW was seeking in the permanent injunction. When Judge Plunkett granted the permanent injunction, it was understood by all concerned that the terms, except as to duration, were the same as those of the preliminary injunction. The duration of a permanent injunction is indicated by the name, and requires no further specification: it is forever, unless dissolved. Since there was no possible uncertainty about the terms of the permanent injunction, the spirit of Rule 65(d) was honored after all. Any doubt on this score was dispelled by the unions' lawyer at oral argument. He said that the unions are bound by the permanent injunction and, specifically, that they are subject to being held in contempt if they violate it. He thereby admitted that if the unions violated the injunction, they could not defend themselves in a contempt proceeding on the ground that there was no injunction. *Bethlehem Mines Corp. v. United Mine Workers*, 476 F.2d 860, 862 (3d Cir. 1973). He tried to retract this concession by a subsequent filing but we are not obligated to permit the retraction, especially as we think he was right the first time. Just as in *Clarkson Co. v. Shaheen*, 544 F.2d 624, 632-33 (2d Cir. 1976), and *Bethlehem Mines Corp. v. United Mine Workers, supra*, 476 F.2d at 862, the injunction was in sufficient if imperfect compliance with the rules to be enforceable. See also *Drummond Co. v. District 20*, 598 F.2d 381, 385 (5th Cir. 1979); cf. *Bethune Plaza, Inc. v. Lumpkin, supra*, 863 F.2d at 528.

The unions argue that there is an even stronger requirement of specificity in a *labor* injunction, citing section 9 of the Norris-LaGuardia Act, 29 U.S.C. § 109—so

strong a requirement, they say, that the failure to satisfy it renders the injunction void. The Act is of course founded on hostility to labor injunctions. But so far as is relevant to this case, all section 9 requires is that the injunction be limited to "a prohibition of such specific act or acts . . . as shall be expressly included in . . . findings of fact" made by the district court. The Memorandum Opinion and Order satisfies this requirement. There was not even a technical violation of section 9, cf. *Drummond Co. v. District 20, supra*, 598 F.2d at 385; and the technical violation of Rule 65(d), as we said, did not void the injunction.

Insofar as the Rule 58 judgment order dismisses the counterclaim, there is no possible doubt about appellate jurisdiction over that dismissal. But the issue that we have been discussing recurs when we turn to the remaining part of the judgment, the order to arbitrate a question stated not in the judgment itself but in the accompanying opinion. Orders to arbitrate, when final (an important qualification not applicable to other injunctions), are mandatory injunctions. *University Life Ins. Co. of America v. Unimarc Ltd.*, 699 F.2d 846, 849 (7th Cir. 1983). (The distinction between interlocutory and final orders to arbitrate is maintained in the recent amendments to the Federal Arbitration Code. 9 U.S.C. § 15.) They therefore are subject to Rule 65(d), and much of our previous analysis is applicable. In particular, the parties have treated the order to arbitrate as a binding injunction that the unions (the recalcitrant party) could not disobey without exposing itself to a contempt judgment. A further point is that the only thing missing from the Rule 58 judgment order is the question to be arbitrated, and there is considerable doubt as we shall see that the district judge has the power under the Railway Labor Act to specify the questions for arbitration.

So we have jurisdiction. But not for the first time we beseech the district judges of this circuit to obviate dis-

putes over appellate jurisdiction by paying careful attention to the requirements of the rules governing orders and judgments.

The decisive issue on the merits is whether what we have here is a major dispute or a minor one. If the railroad, acknowledging that the collective bargaining agreements forbade it to sell a line without protecting the affected employees or at least negotiating with the unions over the consequences for those employees, had filed a section 6 notice demanding a modification of the agreements to free its hand, it would have inaugurated a major dispute, and the status quo provision in section 6, which we quoted earlier, would have barred it from selling the Duck Creek South line until the procedures in that section for resolving the dispute were exhausted. That is not what happened. As the unions now concede, nothing in the agreements forbade the sale of the line with or without protective conditions (other than the bumping rights that the agreements confer), so the railroad was not proposing to modify the agreements and therefore was under no obligation to file a section 6 notice. Since it was not bound to file such a notice, neither was it bound to maintain the status quo, at least as required by that section, for the status quo requirement in section 6 is triggered by the filing of the notice.

It is true that section 2 Seventh of the Act also requires maintenance of the status quo. It says that "no carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section [6]." 45 U.S.C. § 152 Seventh. This provision is necessary in order to prevent a carrier from circumventing the status quo requirement in section 6 by simply not filing a section 6 notice. But insofar as the existing agreements do not limit the railroad's right to sell a line, so that the railroad is not seeking to modify the agreements and therefore was not obliged to file a

section 6 notice, section 2 Seventh is inapplicable unless the sale of the line should be deemed a change in pay, work rules, or working conditions embodied in the collective bargaining agreements. We shall see that it should not be.

It was the filing by the *unions* of a section 6 notice that, they argue, required the railroad to freeze the status quo and not complete the Duck Creek South sale, and so entitled them to strike when the railroad decided to go ahead with the transaction. Section 6 itself states that whether the carrier or the union files the notice, the carrier may not alter the status quo until the section 6 procedures are exhausted—provided that the notice makes a demand that the carrier is required to bargain over. A union cannot freeze the status quo by demanding negotiations over something that the carrier is entitled to do unilaterally either because the collective bargaining agreement authorizes the carrier to do it or because it is within the carrier's "management prerogatives," the class of decisions that are not decisions about rates of pay, rules, or working conditions and so are outside the scope of the status quo provision altogether. *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Association*, *supra*, 109 S.Ct. at 2595. A demand for bargaining that is outside that scope imposes no obligations on the carrier.

The two types of carrier's entitlement to act unilaterally—contractual and prerogative—are not sharply distinct, if indeed they are distinct at all. A matter of prerogative is one the carrier is not required to bargain over and therefore is unlikely to surrender in bargaining, though nothing in the Act forbids it to do so. *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 337-40, 80 S.Ct. 761, 765-67, 4 L.Ed.2d 774 (1960). If there has been no waiver of prerogative in the collective bargaining agreement, then the union cannot insist that the carrier bargain over prerogative matters, such as executive perks, recapitalization, rates

charged shippers, and other matters that are only indirectly—though often vitally—related to the status of the workers represented by the union. The union's insistence on bargaining over such matters confers no rights under section 6.

The C & NW contends that the sale of a line is indeed a management prerogative, citing the Supreme Court's recent decision in *Pittsburgh & Lake Erie*, which held—in part on prerogative grounds—that a railroad is not required to bargain over its decision to leave the business. 109 S.Ct. at 2593-97. Like the Eighth Circuit in *Railway Labor Executives' Ass'n v. Chicago & Northwestern Transportation Co.*, 890 F.2d 1024 (8th Cir. 1989), we agree that the logic of *Pittsburgh & Lake Erie* embraces the sale of a line. Cf. 109 S.Ct. at 2595 n.17, citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686, 101 S.Ct. 2573, 2584, 69 L.Ed.2d 318 (1981). We further agree that *Detroit & Toledo Shore Line R.R. v. Transportation Union*, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969), which held the designation of work stations not to be a matter of management prerogative, and was rather roughly handled in *Pittsburgh & Lake Erie*, 109 S.Ct. at 2594, is distinguishable. The decision to sell a line is not a decision about the utilization of labor or about wages, work rules, working conditions, job rights, etc. It is a decision to reduce the extent of the railroad's business, akin to a manufacturer's decision to curtail its output or to retire unneeded capacity without replacing it. It is not a decision about labor inputs. It has of course consequences for the workers—any major business decision does. But if this were enough to make it a change in pay, work rules, or working conditions, then every significant business decision that a carrier made would be a mandatory subject of collective bargaining; there would be no management prerogatives; and *Pittsburgh & Lake Erie*, which holds that the carrier is not required to bargain over the sale of its business, would be incoherent.

Whether the reduction in output or capacity is to zero is a detail, and a messy one, since it would be absurd to make a railroad bargain over the sale of 99 percent of its lines but not over the sale of 100 percent. The emphasis that the Court in *Pittsburgh & Lake Erie* placed on the desirability of interpreting the Railway Labor Act in harmony with the deregulatory amendments to the Interstate Commerce Act under which the Commission was acting when it simplified railroad sales, 109 S.Ct. at 2596-97, applies with even greater force to line sales than to system sales, the former being so much more common than the latter.

Our decision in *Burlington Northern R.R. v. United Transportation Union*, 862 F.2d 1266 (7th Cir. 1986), which held that a dispute over a trackage rights agreement was subject to section 6, is distinguishable. A trackage rights agreement is much like a line sale—in the normal case. But the case was not normal. The agreement had not been made at arm's length; it was between a parent and its wholly owned subsidiary; we concluded that it was in fact a device for altering the make-up of the parent's train crews. *Id.* at 1273-74.

It is a separate question whether a railroad that sells a line must bargain over the *effect* of the sale on the affected employees if the union so demands by filing a section 6 notice. *Pittsburgh & Lake Erie* answers "yes" in the case of exiting the business, and for reasons just explained the same answer must be given in the case of a line sale, and was in the Eighth Circuit's companion case to ours. 890 F.2d at 1025-26. But the relevant holding of *Pittsburgh & Lake Erie*—since the parties in our case *are* bargaining over the effects of the sale (the matter is in mediation, one of the minuettes in the section 6 quadrille)—is that the right to demand "effects bargaining" does *not* entitle the union to prevent the sale. This is a familiar, not an esoteric, principle of labor law. *First National Maintenance Corp. v. NLRB*, *supra*, 452

U.S. at 617 n. 15, 101 S.Ct. at 2580 n. 15; *International Union v. NLRB*, 802 F.2d 969, 972 (7th Cir. 1986). The sale is separate from the consequences and is allowed to go through while the consequences are being bargained over. Otherwise transactions potentially vital to the company, and to the ICC's program of deregulation of the rail industry, would be stymied. It is now three years since the Duck Creek South sale was proposed and two since it was consummated. It could not have been consummated if the unions' filing of a section 6 notice had frozen the transaction in its tracks.

The unions want us to infer from the Supreme Court's insistence on effects bargaining that what the Court gave management with one hand it took back with the other, and that the dispute over the Duck Creek South sale really is, therefore, a major dispute, as the opinion in the Eighth Circuit's companion case states. 890 F.2d at 1026. It would be, if the railroad refused to bargain over effects (this we take it is the meaning of the Eighth Circuit's ruling). But transaction bargaining (in other industries, it might be over the relocation of a plant, *International Union v. NLRB, supra*) and effects bargaining are not the same thing. The difference is in the timing, and is vital. The unions want to strike in protest against, and if possible undo, the Duck Creek South sale; this they may not do and so the railroad can go ahead and complete it, as it has done. The railroad is prepared to take its chances on the outcome of bargaining over the sale's effects on its workers. Maybe in the end it will agree to modify the collective bargaining agreements to pay these workers some severance pay. But meanwhile it has sold the line, pocketed the proceeds, streamlined its business.

Although the unions can make the railroad bargain over the effects of the Duck Creek South sale on the workers, the district judge was right to deny the unions' request for a bargaining *order*. Judicial intervention in

labor disputes is not favored; and no order is needed to compel what is already being done—and in perfect good faith on the part of both parties, so far as we are able to determine. The railroad does not deny its duty to bargain over effects. Its only reservation concerns its obligation to bargain over its right to make the sale. That reservation is well founded.

There may be another route to the conclusion that the railroad did not alter the status quo by completing the sale of the Duck Creek South line. Even if we are wrong that the railroad has no obligation to bargain over the sale itself, and even if, therefore, the unions' section 6 notice froze the status quo, there has been no violation of the status quo provision in section 6 (or section 2 Seventh) because the sale does not violate the status quo *as defined* by the collective bargaining agreements. Granted, the obligation to maintain the status quo may outlast the particular collective bargaining agreements that are in force. One purpose of the status quo requirement is to maintain the essential provisions of the collective bargaining agreements between the expiration of the existing agreements and the negotiation of new ones. *Air Line Pilots Ass'n v. UAL Corp.*, 897 F.2d 1394, 1398 (7th Cir.1990). But this qualification to one side, what the agreements do not forbid, either explicitly or implicitly (and it is in the latter connection that *practices* are important, as we shall see), the railroad is allowed to do as a matter of contract; and what the railroad is allowed to do *is*, one might suppose (with support from a footnote in *Pittsburgh & Lake Erie*, 109 S.Ct. at 2594 n. 15), the status quo, even if the railroad has not been doing it. Redecorating the railroad's executive dining room does not violate the status quo even if this is the first time the room has ever been redecorated and the collective bargaining agreement is silent about redecoration. The unions now concede, as we have said, that nothing in their collective bargaining agreements forbids the railroad to

sell lines, whether piecemeal or all at once. The status quo is not a fixed number of lines.

If *this* is wrong—if the collective bargaining agreements do not define the status quo exhaustively—still the unions lose. Suppose that the railroad's obligation to maintain the status quo upon the filing of a section 6 notice entails not only compliance with all provisions in the collective bargaining agreements relating to wages, work rules, and working conditions but also the avoidance of any significant, and therefore potentially provocative, change in behavior by the railroad affecting those dimensions of its labor relations. That is the inference one might have drawn from the *Shore Line* decision, had not *Pittsburgh & Lake Erie* described the practice over which the union had wanted to strike in *Shore Line* as "the unquestioned practice for many years, and we considered it reasonable for employees to deem it sufficiently established that it would not be changed without bargaining." 109 S.Ct. at 2594. The practice had, in other words, ripened into a commitment, and thus had become a part of the collective bargaining agreement between the union and the railroad. Practices accompanied by assurances of continuation, express or implied but in either event likely to induce reliance, can create an implied obligation. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, *supra*, 109 S.Ct. at 2485. A practice that supplies a basis "for implying an understanding," *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, *supra*, 109 S.Ct. at 2593, that "demonstrates a mutual understanding between the parties," *General Comm. of Adjustment v. CSX Railroad Corp.*, *supra*, 893 F.2d at 591, that is "understood to be the norm," *Brotherhood of Railroad Signalmen v. Burlington Northern R.R.*, 829 F.2d 617, 620 (7th Cir.1987); *Brotherhood of Maintenance Workers v. Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir.1986), that "constitute[s] a 'course of dealing' between the carrier and the employees," *Rail-*

way Labor Executives' Ass'n v. Norfolk & Western Ry., 833 F.2d 700, 705 (7th Cir.1987), or "a mutually acceptable implied working condition within the parties' course of dealing," *id.* at 705, as distinct from a practice that "contradict[s] the express language of a collective bargaining agreement," *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n, supra*, 855 F.2d at 1283; see also *Railway Labor Executives' Ass'n v. Norfolk & Western Ry., supra*, 833 F.2d at 705 n. 4—such a practice is not a mere regularity (and mere regularities are not normative), but "may itself serve as a term of an agreement." *National Railway Labor Conference v. International Ass'n of Machinists*, 830 F.2d 741, 746 (7th Cir.1987). It is, in fact, a binding although unwritten term of the collective bargaining agreement. The "common law of the shop" that comes into play "when there are overlapping contracts, or when a party seeks to disambiguate a contractual provision by reference to the parties' practices, . . . is not true common law; it is an interpretive concept. It denotes a methodology for interpreting a written contract." *International Ass'n of Machinists v. General Electric Co.*, 865 F.2d 902, 906 (7th Cir.1989).

With this understanding of "practice," *Shore Line* is seen to be consistent with the proposition that the status quo is defined by the agreement of the parties rather than by the practices, as such, that the railroad happened to have been following on the eve of the section 6 notice. But suppose not, and suppose the C & NW's collective bargaining agreements authorize certain layoffs that the railroad has never made, but it makes them as soon as the section 6 notice is filed. On the view we are now entertaining, the status quo is defined not by the collective bargaining agreements but by the statutes (section 2 Seventh and section 6) themselves. A change in the status quo is on this approach any change in pay, work rules, or working conditions that the collective bargaining agreements do not expressly or impliedly authorize,

even if they do not prohibit the change. In other words it is a change not encompassed by the agreements.

If such a change were designed to disrupt the bargaining process, it would violate the statutory duty to bargain in good faith. § 2 First, 45 U.S.C. § 152 First. If it was innocent and nevertheless would be covered by the status quo provisions, we still do not think there was a change in the status quo in the present case. First, as already explained, a sale of the whole or a part of one's business is not a change in pay, work rules, or working conditions, albeit it may affect them. Second, the practice of abandoning unwanted rail lines under standards established by the Interstate Commerce Commission embraced the practice of selling unwanted rail lines under standards established by the same body.

The second point requires elaboration. Apart from the Commission's shifting policies, abandonments and sales have similar effects on workers. Similar, but not identical—yet the differences are such as to make sales the *more* attractive form of transaction from the workers' standpoint (which is the standpoint that is pertinent in deciding whether the railroad is departing from the status quo). For the workers on a line that is sold may be retained by the new owner. It is true, and for the reason just stated not surprising, that the ICC's rules governing abandonments are much more favorable to the affected workers than the rules governing sales because the former require generous severance pay and the latter require nothing. The difference may reflect the better prospects of the worker under the latter form of transaction. In any event the status quo is not altered every time the ICC changes protective conditions. Such changes in this era of regulatory flux in the railroad industry could be anticipated both by the railroad and by the unions, and the railroad was entitled to take advantage of the changes without having first to pass through the fires of section 6 negotiation and survive a possibly

paralyzing strike—especially since the purpose of the latest changes was, in accordance with the congressional mandate, to free the railroad industry from the dead hand of regulation. If the unions did not want to take their chances with the ICC's largesse, they could—they still can—negotiate for severance pay or other protective conditions for workers affected by abandonments or sales. But they have not persuaded us that every time the ICC alters a protective condition, the next sale or abandonment violates a status quo defined by the previous conditions and can therefore be blocked by filing a section 6 notice.

We have gotten pretty tangled in the arcana of the Railway Labor Act and it may be useful to step back for a moment and survey the scene. We take the essential message of *Pittsburgh & Lake Erie* to be that a railroad which like the C & NW has not in bargaining surrendered its right to sell all *or some* of its assets is free to make such a sale without having to bargain with the unions over the making of the sale itself, and hence *in advance* of the sale. The only bargaining the railroad is required to engage in comes afterward, if the unions want to bargain for additional protection for workers made redundant by the sale.

This leaves for discussion the questions of the minor dispute and the order to arbitrate. The district judge ruled, and in upholding the preliminary injunction we agreed, that the dispute over selling the Duck Creek South line without protective conditions was a minor dispute, that is, a dispute over the interpretation of the collective bargaining agreements, and was therefore subject to compulsory arbitration under section 3 of the Act. This conclusion may seem implicit, moreover, in the preceding analysis in this opinion. And yet the unions are emphatic that there is no dispute over the meaning of the collective bargaining agreements, acknowledging without hesitation or reservation that the agreements

permit the sale of the Duck Creek South line without protective conditions. What the agreements do not expressly or impliedly forbid they permit, and they do not forbid line sales or abandonments—all they do is give employees laid off as a result of the sale or abandonment a right to bump less senior employees of the C & NW. We do not understand the unions to be disputing these propositions, and specifically we do not understand them to be contending that, somehow apart from the collective bargaining agreements, there is an arbitrable issue of the railroad's right to make the sale without protective conditions. The unions think they have a major dispute with the railroad, not a minor, and therefore arbitrable, dispute. And it is the railroad that sought the order to arbitrate.

If there is no dispute over the meaning of the collective bargaining agreements, what is there to arbitrate? Nothing, says the railroad, although all it asks for in its cross-appeal is that we modify the terms of reference so that the arbitrators are asked only to decide whether the agreements have been violated. However, the unions' concession that the agreements have not been violated eliminates any arbitrable issue and therefore requires us, if we accept the railroad's position, to vacate the district court's order to arbitrate as moot; there is nothing to arbitrate. The question of the proper disposition of the cross-appeal came up at oral argument, and in a supplemental brief the railroad has reconsidered and asked us to dismiss the cross-appeal as moot. It is indifferent to how the question for arbitration is framed, because after the unions' concessions there will be no arbitration.

The task of arbitrators under the Railway Labor Act —the task, for that matter, of almost all arbitrations— is contractual interpretation. *Lancaster v. Norfolk & Western Ry., supra*, 773 F.2d at 814. If there is no dispute over the meaning of a contract, there is nothing for them to do. Either the district judge disagreed, or, more likely, the unions had not made their position clear to

him or have since changed their position; in any event he thought that "attendant past practices" might be a source of obligation to workers laid off as a result of the Duck Creek South sale, as well as the collective bargaining agreements themselves. If the unions ever took this position in this litigation, they no longer do. As we have been at pains to emphasize in this opinion, practices by themselves do not obligate the practitioner to continue. *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n, supra*, 109 S.Ct. at 2593. But when practices *are* normative—when they create implied obligations under the collective bargaining agreements—their interpretation falls under the sway of section 3 too. For there is no general requirement that a collective bargaining agreement, as distinct from agreements concerning dues and pension rights, be in writing. *Merk v. Jewel Food Stores*, 734 F.Supp. 330, 333 (N.D.Ill.1990), and cases cited there. The contrary statement in *Shipley v. Pittsburgh & Lake Erie R.R.*, 83 F.Supp. 722, 741 (W.D.Pa. 1949), is flat wrong. There could not be such a requirement, because then implied obligations derived from practices would not be enforceable, and they are enforceable; "either express or implied contractual terms, as interpreted through established past practice, will serve to classify a dispute as minor." *General Comm. of Adjustment v. CSX Railroad Corp., supra*, 893 F.2d at 592. Such an obligation is therefore actionable under section 3 of the Railway Labor Act. But the unions do not argue that the practice of the railroad in complying with the ICC's requirements for protective conditions in railroad abandonments created an implied obligation to impose those conditions on any line sale it might make, irrespective of ICC requirements or lack thereof. As stated in the unions' brief in response to the cross-appeal, "rail labor agrees that such similar treatment would be just and fair in this case, but appellants must reluctantly admit that the adjustment boards [the section 3 arbitral bodies] cannot enforce those benefits here," because the benefits are not expressly or impliedly contractual.

To repeat, the unions never wanted arbitration in this case—their position being that this is a major dispute—and they are not defending the order to arbitrate, even though the terms of reference are favorable to them. The railroad doesn't like those terms of reference; but no matter; the unions admit that the order itself has no legal basis. They not only admit it, they trumpet it, because they think it supports their position that their dispute with the railroad is major, not minor. Well, what about a third possibility—that there is neither a major nor a minor dispute over the sale of the Duck Creek South line? Consideration of this possibility will enable us to draw our analysis to a close.

The panel of this court that upheld the preliminary injunction against the unions' striking did so on the ground that it was necessary to protect the exclusive jurisdiction of the arbitrators to resolve minor disputes—exclusive not only of the courts, but of the self-help remedies of the parties. 855 F.2d at 1287. If there is no longer a minor dispute, can the injunction be sustained? And made permanent—forbidding a strike over the sale of the Duck Creek South line forever, even though the arbitration proceeding with which the strike might have interfered is never to take place? The answers are yes.

Insofar as the unions are seeking through their section 6 notice to alter the collective bargaining agreements to require severance pay for workers hurt by line sales, including the workers who lost their jobs in the Duck Creek South sale, section 6 itself forbids the unions to strike until the procedures for peaceful settlement established in that section are exhausted, and they have not been; the matter is in mediation right now. Insofar as the unions want to strike merely to protest a transaction that (as we have seen) does not violate any of their statutory or contractual entitlement, they are using an unauthorized self-help remedy, which violates the Act and is therefore enjoinable. *General Comm' of Adjustment v. CSX Railroad Corp., supra*, 893 F.2d at 586,

595. For with immaterial exceptions illustrated by *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 107 S.Ct. 1841, 95 L.Ed.2d 381 (1987), injunctions to enforce the Railway Labor Act do not violate the Norris-LaGuardia Act. *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, *supra*, 109 S.Ct. at 2598-99; *General Comm. of Adjustment v. CSX Railroad Corp.*, *supra*, 893 F.2d at 595. And if a party to a collective bargaining agreement may not strike to enforce its view of its rights under the agreement, all the more clearly may it not strike to enforce rights that it concedes the agreement does not give it. It may strike to change the agreement once all peaceable means of dispute resolution have been exhausted, but it is bound by the agreement until the agreement is changed. The policy behind the compulsory-arbitration provisions of the Railway Labor Act is to prevent strikes over matters regulated by a binding collective bargaining agreement. The strike that the unions want to conduct in this case in protest against the railroad's exercising rights that it enjoys by virtue of the collective bargaining agreements would flout that policy.

This principle is obscured by the fact that the C & NW is neither relying upon a particular provision in a collective bargaining agreement for the authority to sell lines nor asking, in fact, that the dispute over the sale of the Duck Creek South line be submitted to arbitration to vindicate its contractual rights. This makes it seem as if we have neither a major nor a minor dispute. But this is untrue and in fact the major-minor classification is exhaustive of all possible labor disputes in the railway industry, as we noted in *Brotherhood of Railroad Signalmen v. Burlington Northern R.R.*, *supra*, 829 F.2d at 619. When the C & NW made the sale, it did so on the authority of the collective bargaining agreements, which by not forbidding a transaction otherwise within management's prerogatives permitted it. If the unions disagreed with the C & NW's interpretation of its contrac-

tual rights, their only lawful recourse was an arbitration proceeding under section 3, because a disagreement over what a collective bargaining agreement permits or forbids is a minor dispute. Once a minor dispute, always a minor dispute, at least in the sense that the union cannot convert a minor dispute into a major dispute by conceding that no arbitration is necessary because the railroad's interpretation of the agreement is correct after all. In that case, all the union can do is to try to change the agreement for the future, by filing a section 6 notice, thereby precipitating a major dispute. It cannot break the contract and call the resulting dispute major, entitling it to strike; a dispute is still a minor dispute after one of the disputants has thrown in the towel. Filing a section 6 notice may kick off a major dispute; it does not transform a minor dispute into a major one. *General Comm. of Adjustment v. CSX Railroad Corp., supra,* 893 F.2d at 594; *CSX Transportation, Inc. v. United Transportation Union,* 879 F.2d 990, 1000-01 (2d Cir.1989). Otherwise Congress's desire to confine contract disputes to compulsory arbitration would be thwarted.

We need not decide whether the permanent injunction would have been proper had the parties gone to arbitration and the unions won. For then if the railroad refused to comply with the arbitrators' award, thus thumbing its nose at compulsory arbitration, there would be an argument that the union should have a right to strike in protest. How strong an argument, in view of the amplitude of the Railway Labor Act's judicial remedies for disobeying an arbitration award, 45 U.S.C. § 153 First (p), (q), we need not decide. Our hypothetical case cannot arise in this litigation because the parties are agreed that there is nothing to arbitrate.

A dispute can, as we have emphasized, be a minor dispute subject to the exclusive jurisdiction of the arbitral bodies set up under the Railway Labor Act even if one of the disputants has given up. And abandon-

ment of an unulawful practice ordinarily does not moot proceedings to bring the violator to book (which is one reason you can have a dispute without a present disagreement). *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567, 70 S.Ct. 826, 828, 94 L.Ed. 1067 (1950); *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990). The railroad would still be entitled to a suitable order by the arbitrator. But as the railroad does not want arbitration—and neither does the union—no purpose would be served by ordering arbitration, although, to repeat, the dissolution of the order to arbitrate does not signify that the dispute is not a minor one. It is a minor one.

Not only would no puropse be served by ordering arbitration, but there is a considerable question, though again not necessary to decide, concerning the district court's power to order arbitration. The Act does not confer such a power, and we are unclear what purpose would be served by interpolating one. Either party to a collective bargaining agreement can invoke the arbitral process, 45 U.S.C. § 153 First (i), which will then proceed to an award enforceable in district court under sections First (p) or (q), whether or not the other party cooperates; there can be a default in arbitration just as there can be a default in adjudication. There is no need for a party to run to the court first for an order to arbitrate, and we are given no explanation for why the railroad followed that procedure here.

The district court's grant to the C & NW of a permanent injunction against the unions' striking over the Duck Creek South sale, and the denial of the unions' request for a bargaining order and an injunction against a change in the status quo, are affirmed, except that we shall remand the case to permit the district court to modify the injunction to comply fully with Rules 58 and 65(d). The cross-appeal is dismissed with directions to the district court to vacate its order to arbitrate as moot. There will be no award of costs in this court.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 88 C 444

CHICAGO & NORTH WESTERN TRANSPORTATION CO., *et al.*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this is an arbitrable minor dispute. This Court grants C&NW's motion for partial summary judgment in that we grant their motion for a permanent injunction and we dismiss RLEA's counterclaim. We deny RLEA's motion for summary judgment. This dispute will be arbitrated by the NRAB, and we have herein determined the issue to be arbitrated.

H. STUART CUNNINGHAM
Clerk

/s/ Theresa B. Kinney
THERESA B. KINNEY
(By) Deputy Clerk

Date October 6, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 444

Honorable Paul E. Plunkett

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and FRVR CORPORATION, *et al.*,
Plaintiffs,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs Chicago & North Western Transportation Company ("C&NW") and FRVR Corporation ("FRVR") move for partial summary judgment in this matter on the grounds that the dispute between the parties over the effects on C&NW employees of the sale of C&NW's "Duck Creek South" lines is a "minor dispute" under § 3 of the Railway Labor Act, 45 U.S.C. § 153. Plaintiffs seek a permanent injunction against strikes by defendant union represented in this action by the Railway Labor Executive's Association ("RLEA") and a dismissal of defendants' counterlaim for a status quo injunction. Plaintiffs also seek an order defining the precise issue to be arbitrated by the National Railroad Adjustment Board ("NRAB"). Defendants move for summary judgment on the grounds that the Supreme Court's decision in *Pittsburgh & Lake Erie R.R. v. RLEA*, 109 S. Ct.

2584 (1989) requires us to reject plaintiffs' claim that rail labor may not compel the C&NW to bargain over the manner in which its decision to sell the Duck Creek South lines will affect its employees. For the following reasons, we grant plaintiff's motion for partial summary judgment by granting a permanent injunction against a strike to protest the sale of the Duck Creek South lines and by dismissing RLEA's counterclaim for a status quo injunction. We also clarify the issue to be arbitrated below. We deny RLEA's motion for summary judgment.

Background

The facts and procedural history of this case are amply set out in the Seventh Circuit's opinion in this case affirming our opinion and order of March 16, 1988. *See C&NW v. RLEA*, 855 F.2d 1277, 1279-81 (7th Cir. 1988), and will therefore not be repeated here. The current posture of this case is that C&NW has been granted a preliminary injunction barring the RLEA member unions from striking pending adjudication of the parties' dispute by the NRAB, and RLEA has been denied its motion for a preliminary injunction barring the Duck Creek South line sale. Final district court action in this case was stayed pending the Supreme Court's decisions in *P&LE v. RLEA*, 109 S. Ct. 2854 (1989), and *Conrail v. RLEA*, 109 S. Ct. 2477 (1989). The parties have now fully briefed the issues before us today in light of *P&LE* and *Conrail*.

Analysis

We have already decided, and the Seventh Circuit has affirmed that the dispute between the parties over the sale (and effects thereof) of the Duck Creek South line is a "minor dispute" under the Rail Labor Act. *See C&NW v. RLEA*, 855 F.2d at 1281-86. Nothing has changed in the interim to alter that holding. In fact, the Supreme Court recently adopted, in *Conrail v. RLEA*, 109 S. Ct. 2477 (1989), the same analytical framework

that the Seventh Circuit used in the instant case. *See Conrail*, 109 S. Ct. at 2479-82.

RLEA argues that the Supreme Court's decision in *P&LE v. RLEA*, 109 S. Ct. 2854 (1989) mandates that the instant dispute be categorized as a "major" dispute, thereby invoking the "purposefully long and drawn out procedures" for bargaining and the status quo provisions of § 6 of the RLA. 45 U.S.C. § 156. In *P&LE*, the Supreme Court held that where railroad management wants to get out of the railroad business altogether and cease to be a railroad employer, rail labor had no § 6 status quo claim unless it could show that the railroad had violated its existing labor agreements, express or implied, by selling the entire railroad. The Supreme Court distinguished the *P&LE* facts of a railroad company getting out of the railroad business altogether from those of its prior precedent in *Detroit & Toledo Shore Line R.R. Co. v. Transp. Union*, 396 U.S. 142 (1969) (*Shore Line*), and *Telegraphers v. C&NW*, 362 U.S. 330 (1960). In *Shore Line*, the Court held that the "major" dispute procedures, including the § 6 status quo provision, were implicated where a railroad wanted to reassign certain workers from one yard to another. In particular, the § 6 status quo provision that "rates of pay, rules, or working conditions shall not be altered" pending exhaustion of the required "major" procedures forbade any change by the railroad of the "objective working conditions" then existing. 396 U.S. at 153. In *Telegraphers*, as the Supreme Court recounted in *P&LE*, a railroad's proposal to eliminate or consolidate some of its little used local stations and to thereby abolish some jobs was a "major" bargainable issue under 45 U.S.C. § 156. *See* 109 S. Ct. at 2595 and n.17.

RLEA argues in its motion for summary judgment that *P&LE*'s limitation of the § 6 status quo obligations in line sales applies only in whole-line sale cases where

the railroad is going out of business entirely. RLEA points out that *P&LE* did not overrule *Shore Line* or *Telegraphers*, and that we should therefore treat the instant case as more like *Shore Line* and *Telegraphers* than like *P&LE* because here C&NW is only selling a small faction [*sic*] of its entire line.

C&NW argues that its sale of the Duck Creek South line is just like *P&LE*'s sale of the entire operations. C&NW points out that the key to *P&LE* was management's perogative to abandon an industry takes precedence over labor's major dispute rights under the RLA. C&NW claims that by selling off the Duck Creek South line it is "abandoning" that "business," and should therefore be treated like the railroad in *P&LE*. C&NW then argues that because the only issue in *P&LE* was whether or not management violated its express or implied agreements with rail labor by going out of business, that the only issue in the instant case is whether or not C&NW violated its express or implied agreements with RLEA when it sold the lines. C&NW concludes that because RLEA does not dispute that C&NW violated no part of its collective bargaining agreements when it sold the line, that C&NW is therefore entitled to complete summary judgment and that there is nothing to arbitrate.

We reject both sides' analysis of the effect of *P&LE* on the instant case. As to RLEA's arguments, when we previously decided, and the Seventh Circuit affirmed, that the dispute in this case was "minor" and that there was no § 6 status quo obligation, we did so with *Shore Line* and *Telegraphers* as our legal backdrop. In the face of those cases, we decided that C&NW had met its burden in establishing the instant dispute as being "minor." *P&LE* did not expant [*sic*] *Shore Line* or *Telegraphers*. Rather, *P&LE narrowed* those cases when faced with its special facts of total railroad divestiture. True, the instant facts are not identical to those in *P&LE*. *P&LE*

did not present a major dispute, and nothing in the Supreme Court's opinion in *P&LE* suggested that anything other than total divestment from the railroad industry would result in a "major" dispute. Our prior decision that the controversy between the parties is a minor dispute subject to mandatory arbitration under RLA § 3 stands. We therefore reject RLEA's motion for summary judgment.

We likewise reject C&NW's analysis of the effects of *P&LE*. C&NW wants to narrow the issue before the NRAB down to whether or not C&NW violated its express or implied agreements with RLEA in selling the Duck Creek South lines. Of course, that would narrow the issue before the NRAB out of existence because RLEA does not argue that there were any agreements regarding C&NW's right to sell part of its rail holdings. We refuse to narrow the issue for arbitration to the issue left in *P&LE*. Essential to the Supreme Court's holding in *P&LE* was that the railroad employer was getting out of the industry altogether and would thus no longer be a railroad employer. That decision is "so peculiarly [a] matter[] of management prerogative that [it] would never constitute [a] violation[]" of § 6 of the RLA. 109 S. Ct. at 2595. For purpose of the arbitration issue, the instant case is quite unlike *P&LE*. C&NW is not abandoning the industry and it continues to be a railroad employer. The issue to be arbitrated is not the narrow one of whether or not C&NW violated any agreement with RLEA. The issue to be arbitrated is what should happen to the C&NW employees who are affected by the line sale. The NRAB is to decide what treatment, in terms of pay (severance or otherwise), seniority rights, benefits rights, transfer rights, etc., the employees of C&NW (who are affected by the line sale) are entitled to in terms of contractual provisions and attendant past practices. This issue for arbitration is essentially the issue presented by C&NW to the NRAB on February 24, 1989. While we have laid out the parameters for the

arbitration in this opinion, we leave it to the NRAB to determine the precise issues to be arbitrated consistent with this opinion.[1]

In the context of the "minor" dispute provisions of the RLA, we now address C&NW's other requested relief. The first issue is whether or not C&NW is entitled to permanent injunctive relief. We have already granted C&NW a preliminary injunction barring RLEA unions from striking over the sale of the Duck Creek South lines. RLEA claims that C&NW is not entitled to permanent injunctive relief because the NRAB has not yet ruled that C&NW has a meritorius contract defense. RLEA claims that if they win the dispute before the NRAB, they will then have the right to strike. We find that RLEA is clearly wrong. As the Supreme Court held in *Locomotive Eng'rs v. L&NR Co.*, 373 U.S. 33 (1963), the arbitration procedures of the RLA are "a compulsory substitute for economic self-help, not merely a voluntary alternative to it." 373 U.S. at 39. The Court went on to hold that strikes relating to minor disputes are prohibited at any time, even after the arbirtation board has rendered its decision. 373 U.S. at 40-42. The premise behind the RLA minor dispute provisions is that because the disputes are "minor," (i.e., over contract interpretation) the disputes are channeled into peaceful arbitration procedures. Thus, the arbitration board (here the NRAB) is given exclusive jurisdiction over the dispute, and has the power to fashion whatever relief is necessary to make the employers whole (assuming rail labor prevails). *See C&NW v. RLEA*, 855 F.2d at 1288; *CSX Transp., Inc. v. United Transp. Union*, 879 F.2d 990,

[1] We note here that we find it to be our duty to generally define the minor issue to be arbitrated. *See, e.g., John Wiley & Sons, Inc. v. Livington*, 376 U.S. 543, 546-47 (1964). We do not feel, however, that we need to define the issue so as to leave the NRAB no room to fashion appropriate relief. We therefore give the NRAB the leverage to decide what the proper treatment of the affected employees should be.

1004-05 (2d Cir. 1989). In the event RLEA is dissatisfied with C&NW's compliance with a future arbitration award relating to the Duck Creek South line sale, RLEA's only alternative is to seek judicial enforcement of the award. *See* 45 U.S.C. § 153 First (q); *CSX v. UTU*, 879 F.2d at 1005. Whatever the result of the arbitration is, RLEA is not permitted to strike over the line sale. We therefore grant C&NW's motion for permanent injunctive relief.

The final remaining issue is whether or not to dismiss RLEA's counterclaim. RLEA's counterclaim seeks declaratory relief regarding the § 6 notices, and a status quo injunction. We have already denied the injunction on the grounds that we have no jurisdiction to fashion such relief because it is an arbitrable minor dispute in the exclusive jurisdiction of the NRAB. As to the § 6 notices, both sides seek a declaratory judgment as to validity (or invalidity) of the § 6 notices RLEA served on C&NW. We find this dispute to now be moot. Section 6 notices invoke the major dispute procedures of the RLA. We have already decided that this is a minor dispute. C&NW thus need not bargain with RLEA over the line sale. Rather, both sides must submit to arbitration. We therefore grant C&NW's motion to dismiss all of RLEA's counterclaim.

Conclusion

This is an arbitrable minor dispute. We grant C&NW's motion for partial summary judgment in that we grant their motion for a permanent injunction and we dismiss RLEA's counterclaim. We deny RLEA's motion for summary judgment. This dispute will be arbitrated by the NRAB, and we have herein determined the issue to be arbitrated.

ENTER:

/s/ Paul E. Plunkett
HONORABLE PAUL E. PLUNKETT
District Court Judge

Dated: 10/6/89

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 88 C 0444

JUDGMENT IN A CIVIL CASE

CHICAGO and NORTH WESTERN
TRANSPORTATION COMPANY

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Defendants, their divisions, lodges, agents, officers, employees, and members and all persons acting in concert with them, including all employees of the C&NW who are members of any of the defendant unions, are hereby permanently enjoined from authorizing, calling, continuing, encouraging, permitting, or engaging in strikes, work stoppages, slowdowns, picketing, or other similar concerted action against C&NW over the sale of the Duck Creek South lines or the effects of the sale on employees.

This injunction is effective *nunc pro tunc* from the date of the entry of this Court's Judgment and Memorandum Opinion and Order dated October 6, 1989.

H. STUART CUNNINGHAM
Clerk

/s/ Theresa B. Kinney
THERESA B. KINNEY
(By) Deputy Clerk

Date July 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88-C-0444

CHICAGO & NORTH WESTERN
TRANSPORTATION COMPANY,
Plaintiff,

v.

RAILWAY LABOR EXECUTIVES ASS'N, AMERICAN RAILWAY & AIRWAY SUPERVISORS ASS'N, AMERICAN TRAIN DISPATCHERS ASS'N, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, BROTHERHOOD OF RAILROAD SIGNALMEN, BROTHERHOOD OF RAILWAY CARMEN, INTERNATIONAL ASS'N OF MACHINISTS & AEROSPACE WORKERS, INTERNATIONAL ASS'N OF BOILERMAKERS & BLACKSMITHS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS, RAILROAD YARDMASTERS OF AMERICA, SHEET METAL WORKERS' INT'L ASS'N, TRANSPORTATION COMMUNICATIONS UNION, and UNITED TRANSPORTATION UNION,
Defendants.

PERMANENT INJUNCTION

This above-entitled cause came before the Court on the motion of plaintiff Chicago & North Western Transportation Company ("C&NW") for a permanent strike injunction, and the Court, having reviewed the evidence of record and the arguments of the parties, makes the following findings:

1. That defendants have threatened to strike C&NW over C&NW's sale of its former Duck Creek South lines of railroad and the effects of that sale on employees,

which defendants contend violated the status quo requirements of the Railway Labor Act ("RLA");

2. That C&NW has asserted that the sale and its effects on employees were covered by and authorized under the carrier's existing labor agreements with defendants and attendant past practices;

3. That C&NW's assertions as to the application of its existing labor agreements and attendant past practices to the sale and its effects on employees are at least arguably correct; and

4. That C&NW has submitted to the National Railroad Adjustment Board, for arbitration under § 3 of the RLA, 45 U.S.C. § 153, questions as to the application of its existing labor agreements and attendant past practices to the sale and its effects on employees.

The Court therefore concludes that defendants' protest against the consummation of the sale and its effects on employees is a minor dispute subject to mandatory arbitration under § 3 of the Railway Labor Act ("RLA"), and it is therefore ORDERED, DECREED, AND ADJUDGED that:

1. Defendants, their divisions, lodges, locals, agents, officers, employees, and members and all persons acting in concert with them, including all employees of the C&NW who are members of any of the defendant unions, are hereby permanently enjoined from authorizing, calling, continuing, encouraging, permitting, or engaging in strikes, work stoppages, slowdowns, picketing, or other similar concerted action against C&NW over the sale of the Duck Creek South lines or the effects of the sale on employees.

2. This injunction may be served by any person over the age of eighteen years selected for the purpose by a plaintiff or plaintiffs.

3. This injunction is effective *nunc pro tunc* from the date of the entry of this Court's Judgment and Memorandum Opinion and Order dated October 6, 1989.

Date: July 2, 1990

/s/ Paul E. Plunkett
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1504

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
FRVR CORPORATION, and
INTERSTATE COMMERCE COMMISSION,
Plaintiffs-Appellees,

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 88-C-444—Paul E. Plunkett, *Judge*

ARGUED APRIL 21, 1988—DECIDED AUGUST 23, 1988

Before WOOD, JR. and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* Appellant Railway Labor Executives Association ("RLEA") appeals from the district court's order granting a preliminary injunction to appellee Chicago & North Western Transportation Company ("C&NW") barring a strike by RLEA's

constituent unions and denying RLEA's motion for a preliminary injunction barring the sale of C&NW's Duck Creek South line. We have jurisdiction over this matter pursuant to 28 U.S.C. § 1292(a)(1).

I

C&NW is a Class I rail carrier with operations in ten midwestern states. At present C&NW has approximately 9,000 employees. It is a party to eleven collective bargaining agreements with some fourteen unions representing its employees. Those unions are represented in this action by the RLEA. In the past twenty years C&NW has substantially reduced the size of its rail system by abandoning or selling unprofitable segments of track. Since 1981, its work force has been significantly reduced, including the elimination of a large number of craft jobs covered by the eleven collective bargaining agreements.

In 1987 C&NW decided to sell a portion of its system known as the Duck Creek South line to FRVR Corporation ("FRVR"). FRVR is a new corporation and is not a Class I rail carrier. That fact and the "short line" nature of the Duck Creek South line, brought the proposed sale within the reach of the expedited procedure for securing prompt Interstate Commerce Commission ("ICC") approval of certain regional and short-line railroad sales articulated in the Commission's decision in *Ex Parte No. 392*, 1 ICC2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).[1] The proposed sale would result in the abolish-

[1] It is not necessary for the purposes of our analysis to fully recapitulate the course of events that lead the ICC to formulate the policy set forth in *Ex Parte No. 392*. It is sufficient to note that the new policy has its genesis in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and to briefly explain its primary features. The Staggers Act authorized the ICC to exempt from regulation a broad range of rail-related transactions deemed to be of limited scope. 49 U.S.C. § 10505(a). Acting pursuant to that stat-

ment of more than 300 craft jobs on the C&NW. The majority of the craft employees whose jobs on the Duck Creek South line would be eliminated (some 200) would be hired by FRVR. C&NW anticipates that the balance of the affected employees will be able to find positions in the remainder of its system.

On December 23, 1987 C&NW and FRVR filed a Verified Notice of Exemption and Petition for Clarification with the ICC with regard to the Duck Creek South line sale. Under the procedures established in *Ex Parte No. 392*, the Commission's authorization of the sale became effective on December 30, 1987. In December 1987 C&NW had informed the RLEA-represented unions of its intention to sell the Duck Creek South line. It did not serve notice on the unions under § 6 of the Railway Labor Act ("RLA" or the "Act"), 45 U.S.C. § 156, of an intent to change rates of pay, rules or working conditions. However, it did make one or more proposals to the unions pertaining to the payment of separation allowances to employees whose employment with C&NW would be terminated by the sale.

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utory authorization, the Commission has developed a policy whereby a short-line rail sale to a non-carrier (like FRVR) is automatically approved within seven days of the filing of an application with the ICC for exemption from regulation under the Interstate Commerce Act, unless the Commission disapproves the application for exemption. 49 CFR 1150.32(b). In *Ex Parte No. 392* the ICC announced its intention to exempt "substantially all" sales of rail lines to non-carriers from regulation under § 10901 procedures. 1 ICC2d at 816. One of the key ramifications of the ICC's new policy with regard to the approval of regional and short-line sales is the fact that the Commission no longer routinely imposes "labor protective conditions" on such sales. *Id.* at 815. These labor protective conditions, formerly imposed by the ICC as a routine part of its approval of a rail line sale, resulted in substantial pay and benefits protections being extended to the employees whose jobs were affected by such sales. In large part, the present dispute between C&NW and the RLEA member unions arises from the unions' efforts to negotiate pay, economic and other benefits to replace the protections formerly imposed by the ICC.

Upon learning of the planned sale of the Duck Creek South line, as early as October 1987, the several unions filed § 6 notices with C&NW seeking to negotiate an agreement covering the employees whose jobs would be affected. In February 1988 the unions served new § 6 notices on C&NW expressing their desire to negotiate severance notice requirements and wage, benefit and seniority protections for the craft employees who would be displaced by the sale of the Duck Creek South line. C&NW has refused to enter into negotiations with the unions under the RLA § 6 procedures.

On January 19, 1988 C&NW filed the present action under 28 U.S.C. § 2201 seeking a declaratory judgment that the proposed sale of the Duck Creek South line to FRVR and any labor protective provisions that might accompany it are subject to the exclusive jurisdiction of the ICC and therefore are not a proper subject of bargaining under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1948). On February 22, 1988, FRVR's motion to intervene as a plaintiff was granted by the district court. On March 3, 1988, the ICC's motion to intervene as a plaintiff was granted.

Sometime in February 1988, C&NW informed the unions that the Duck Creek South line sale would be consummated on March 4, 1988. In response, the unions informed C&NW of their intent to strike if the sale went through without either an agreement being reached on the notice and other rights that would be afforded the employees displaced by the sale, or alternatively, an exhaustion of the RLA § 6 procedures. In response on February 24, 1988, C&NW filed in the district court a motion for a temporary restraining order and a preliminary injunction to prevent the unions from striking. RLEA filed cross-motions to enjoin the sale and in opposition to the temporary restraining order and preliminary injunction sought by C&NW. Pending resolution of this matter by the district court, C&NW agreed not to complete the Duck Creek South line sale and the unions agreed not to strike.

C&NW's motion and RLEA's cross-motion came before the district court for hearing on March 16, 1988. At the close of that hearing the district court announced its decision. The court refused to enjoin the Duck Creek South line sale, holding that it was without jurisdiction to do so because RLEA's effort to procure that injunction constituted an impermissible collateral attack on an ICC order. In so holding, the district court expressed its disagreement with the decision to the opposite effect of the U.S. Court of Appeals for the Third Circuit in *RLEA v. Pittsburgh & Lake Erie Railroad Co.*, 845 F.2d 420, 437-39 (3d Cir. 1988) (holding, *inter alia*, that an effort by RLEA to obtain an injunction to prohibit a railroad from selling its rail assets pending bargaining over the effects of the sale on employees under the § 6 dispute resolution procedures of the RLA did not constitute an impermissible collateral attack on the ICC's decision to permit the sale under its *Ex Parte No. 392* procedure).

The district court granted C&NW's motion for a preliminary injunction against the threatened strike. The district court based this second holding on its interpretation of the RLA. Applying and interpreting relevant precedent from our Circuit, the district court determined the dispute between the RLEA and C&NW to be a "minor dispute" under the RLA dispute resolution framework and therefore subject to the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB"). Finally, the district court refused to condition the preliminary injunction barring any strikes on a delay in the Duck Creek South line sale.

The district court ordered C&NW and the RLEA to proceed with the resolution of their dispute before the NRAB pursuant to the § 3 RLA procedures. 45 U.S.C. § 153. On March 24, 1988 our Court agreed to hear the RLEA's appeal on an expedited basis. C&NW and FRVR agreed to delay consummation of the Duck Creek South line sale pending the decision of the present appeal.

II

On this appeal we are asked to review the decision of the district court to grant a preliminary injunction barring a threatened strike by the several craft unions represented by the RLEA and the district court's concomitant decision to deny RLEA's request that it enjoin the Duck Creek South line sale. The district court's decision and the contentions of the parties focus upon the effect in this dispute of the RLA and the provisions of the Interstate Commerce Act pertaining to railroad carriers, 49 U.S.C. §§ 1 et seq. Our review of the district court's determinations of these questions of law is *de novo*. *Curtis v. Thompson*, 840 F.2d 1291, 1296 (7th Cir. 1988). *See also United States v. L'Allier*, 838 F.2d 234, 240 (7th Cir. 1988) (holding that a district court's determination of a question of law is reviewed *de novo*). We will address first the issues pertaining to the Railway Labor Act.

III

A. The Relevant RLA Case Law

The Railway Labor Act was enacted by Congress to promote stability in labor-management relations in the railroad industry by providing, *inter alia*, procedures designed to facilitate the orderly and peaceful resolution of labor-management disputes. *Brotherhood of Railroad Signalmen v. Burlington Northern Railroad Co.*, 829 F.2d 617, 619 (7th Cir. 1987) (citing *Leu v. Norfolk & Western Railway*, 820 F.2d 825, 827 (7th Cir. 1987)). Labor-management disputes that arise under the RLA are classified either as "major disputes" or "minor disputes." The "major dispute"/"minor dispute" distinction is essential in that it determines which of the two RLA labor-management dispute resolution procedures a rail carrier employer and its unions must follow when a disagreement arises as to matters affecting employees represented by those unions. *Railway Labor Executives Association v.*

Norfolk & Western Railway Co., 833 F.2d 700, 703-04 (7th Cir. 1987).

> If a dispute is major, the parties must attempt to resolve it through negotiation, mediation [by the National Mediation Board] and possible presidential intervention [as contemplated by the procedures set forth in 45 U.S.C. §§ 154-160]. If a major dispute cannot be resolved, the union can strike in support of its position. If a dispute is minor, the parties first must attempt to resolve their dispute through negotiation. If negotiation fails, however, the parties must submit their minor dispute to the National Railway Adjustment Board for resolution. The NRAB's jurisdiction over minor disputes is exclusive. A minor dispute cannot be the subject of a strike.

Id. at 704 (citations omitted).

The terms "major dispute" and "minor dispute" are nowhere defined in the RLA. Rather, as our Court has previously observed, the "terminology is drawn from judicial gloss on the statute" that finds its origin in the U.S. Supreme Court's decision in *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 722-27, 65 S. Ct. 1282, 1289-91 (1945). *National Railway Labor Conference v. International Association of Machinists and Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987).

The distinction between major disputes and minor disputes is an imprecise one. *RLEA*, 833 F.2d at 703. Nevertheless, it is clear that the primary point of reference in drawing this bifurcation is the collective bargaining agreement between the rail carrier and the involved union(s). *Chicago & North Western Transportation Co. v. International Brotherhood of Electrical Workers, Local Union No. 214*, 829 F.2d 1424, 1427 (7th Cir. 1987). Thus, in *Burley, supra*, the Supreme Court defined major disputes and minor disputes in the following manner.

> [The term major dispute] relates to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise when there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of legal rights for the future, not to assertion of rights claimed to have vested in the past.
>
> [The term minor dispute] contemplates the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, *e.g.* claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

325 U.S. at 723, 65 S. Ct. at 1290.

Our Court has characterized the difference in the two types of RLA labor disputes in several different ways. A major dispute has been variously described as one "over the formation or alteration of [a] collective bargaining agreement[]," *Machinists*, 830 F.2d at 746, or as an "attempt to create a contract or change the terms of a contract," *IBEW*, 829 F.2d at 1427. *Accord Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 797 (1st Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 111 (1986). Consistent with the approach we have taken is the view of the Eighth Circuit which places within the major dispute category a proposed action by a rail carrier that "is a clear departure from the collective

bargaining agreement." *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*, 802 F.2d 1016, 1017 (8th Cir. 1986).

An examination of our Circuit's earlier decisions disclose the following characterizations of minor disputes under the RLA. "A minor dispute is a dispute over the interpretation of an existing contract." *IBEW*, 829 F.2d at 1427. "Minor disputes do not involve fundamental changes in labor-management relations but rather focus on whether a change is arguably comprehended within an already existing collective bargaining agreement." *Burlington Northern*, 829 F.2d at 619. Our cases make one thing clear. In order to ascertain if a dispute between a rail carrier and the union(s) representing its employees is major or minor, we "must determine whether the dispute can be resolved by reference to an existing collective bargaining agreement." *RLEA*, 833 F.2d at 704.

If the dispute can be resolved by reference to the parties' collective bargaining agreement, *i.e.*, if it is "arguably comprehended within an already existing collective bargaining agreement," it is a minor dispute. *Burlington Northern*, 829 F.2d at 619. In ascertaining whether a rail carrier's disputed actions are justified by or fall within the parameters of an existing collective bargaining agreement, the courts are permitted to look to the "settled past practices of the parties" under that agreement. *See Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1017. *See also Machinists*, 830 F.2d at 747 ("Collective bargaining agreements in the railroad industry are, of course, contracts, and the custom and usage in the trade or the past course of dealing among the parties may well be relevant to a determination of any ambiguity in the contractual language."). "Within the railroad industry in particular, it is common practice to omit from written agreements non-essential practices that are acceptable to both parties." *RLEA*, 833 F.2d at 705.

Thus, in determining the range of employer actions that can arguably be said to fall within the scope of a collective bargaining agreement, we may properly consider both the agreement's express terms and "any well established practices that constitute a 'course of dealing' between the carrier and employees." *RLEA*, 833 F.2d at 705 (footnote omitted) (quoting *Detroit and Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 154, 90 S. Ct. 294, 301 (1969)). Our Court has acknowledged that an established past practice cannot be used to contradict the express language of a collective bargaining agreement in an effort to transmute a major dispute into a minor dispute. *RLEA*, 833 F.2d at 705, n. 4 (citing *Brotherhood of Railway Carmen v. Norfolk & Western Railway*, 745 F.2d 370, 376-78 (6th Cir. 1984). *See also Machinists*, 830 F.2d at 747 ("arguments from past practice may be relevant to the characterization of a dispute as major or minor, but it is also true that they most often have only a limited impact on the characterization") (footnote omitted).

In deciding whether a dispute can be resolved by reference to the existing collective bargaining agreement(s) and relevant established past practice, "[t]he court does not consider the merits of the underlying dispute; its role is limited to determining whether the dispute can be characterized as involving the proper application or meaning of a contract provision." *RLEA*, 833 F.2d at 704. *See also Maine Central Railroad Co. v. United Transportation Union*, 787 F.2d 780, 782 (1st Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 169 (1986) (holding that where a rail carrier has presented evidence that arguably supports its claim of a contractually-based past practice covering a matter in dispute "the court's inquiry must end; it is not for it to weigh, and decide who has the better of the argument"). "Where the parties disagree over whether the dispute can be resolved by reference to an agreement the dispute is minor unless the claims of contractual justification are 'frivolous' or 'obviously in-

substantial.'" *Machinists*, 830 F.2d at 746 (quoting *Atchison, Topeka and Santa Fe Railway v. United Transportation Union*, 734 F.2d 317, 321 (7th Cir. 1984)). *See also RLEA*, 833 F.2d at 704; *Burlington Northern*, 829 F.2d at 619.

It is clear that the primary factor underlying this predisposition, in close cases, in favor of a "minor dispute" finding is the concern for minimizing the occurrence of strikes in the rail transportation industry. *See Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.*, 768 F.2d 914, 920 (7th Cir. 1985). Rail unions are not permitted to strike over minor disputes. *Burlington Northern*, 829 F.2d at 619 (citing *Brotherhood of Railroad Trainmen v. Chicago River & Indian Railway Co.*, 353 U.S. 30, 77 S. Ct. 635 (1957)). *See also RELA*, 833 F.2d at 704 ("A minor dispute cannot be the subject of a strike.").

> The primary objectives of the RLA are to promote stability in labor relations in the railroad industry and prevent strikes. Because a major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor.

RLEA, 833 F.2d at 705 (citing *Detroit and Toledo*, 396 U.S. at 154, 90 S. Ct. at 301; *Leu*, 820 F.2d at 827; and *Atchison*, 768 F.2d at 920). In addition, we have cited the "need to protect the [NRAB's] exclusive jurisdiction over minor disputes" as another reason for the corollary that "'when in doubt, the court construes disputes as minor.'" *Machinists*, 830 F.2d at 746 (quoting *Atchison*, 768 F.2d at 920).

B. The Major Dispute-Minor Dispute Determination

Our review of the district court's determination that the present dispute between C&NW and RLEA is a minor dispute under the RLA scheme is guided by the preceding

summary of the extensive relevant precedent in our Circuit. Because C&NW claims that its controversy with RLEA arising from the proposed sale is a minor dispute, it can properly be assigned the burden of proving that assertion. The preceding analysis demonstrates that the employer's burden is "relatively light". *Burlington Northern*, 829 F.2d at 619. *See also Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1022.

RLEA attempts to frame this dispute as one pertaining to the changed pay, seniority status and working conditions that will be encountered by the current C&NW employees whose employment rights will be affected by the proposed sale of the Duck Creek South line. RLEA insists that C&NW does not have a right under the collective bargaining agreements to abolish jobs within the context of a rail line sale and concurrently refuse to negotiate over the effects of that sale on its present employees. The RLEA constituent unions have served § 6 notices on C&NW seeking changes in the current collective bargaining agreements pertaining to the pre-sale/job abolishment and post-sale/job abolishment status of the employees who will be affected by the proposed sale. Given that fact, and because no provision of the current agreements expressly grants C&NW the right to sell a rail line and abolish jobs without negotiating over the effects of that sale, RLEA insists that C&NW cannot be permitted to claim that this controversy is one that can be resolved based on the existing collective bargaining agreements.

C&NW first notes two aspects of RLEA's position which it believes to be of significance. RLEA does not challenge C&NW's right under the collective bargaining agreements to abolish jobs once the work assigned to those positions is no longer available. Second, RLEA concedes that the present contractual provisions, unless changed, will continue to govern the employment-related rights of the current C&NW employees who will be affected by the Duck Creek South line sale. In its own substantive argu-

ment, C&NW contends that the job abolishment, layoff and reassignment actions it will take as a result of the Duck Creek South line sale are fully authorized by the collective bargaining agreements. C&NW insists further that it has for some twenty years taken similar actions (*i.e.*, discontinuing operations on certain portions of track and concurrently abolishing jobs and laying off and reassigning employees) without objection from the RLEA unions (with one recent exception) and without a demand from the unions that the § 6 RLA procedures be initiated.

We are not concerned with the relative merits of the parties' arguments as to whether the actions C&NW would take with regard to the employees affected by the Duck Creek South line would violate or are sanctioned by the current collective bargaining agreements between C&NW and the RLEA unions. *See RLEA*, 833 F.2d at 705; *Maine Central Railroad*, 787 F.2d at 782. Ascertaining the actual validity of C&NW's claims of contractual justification is a task falling outside the limited role of the federal courts in rail carrier-union disputes arising under the RLA. Rather, our charge is to determine if the subject matter of the parties' dispute is "arguably comprehended" within, and potentially amenable to resolution by reference to, their existing collective bargaining agreements and the attendant established past practices not in conflict with the terms of those agreements. *See RLEA*, 833 F.2d at 704-05; *IBEW*, 829 F.2d at 1427; *Burlington Northern*, 829 F.2d at 619; *Machinists*, 830 F.2d at 747.

We have carefully evaluated the claims of the parties and examined the evidence in the record as to the terms of their collective bargaining agreements and the relevant past practices attendant to those agreements. There can be no doubt that the agreements and past practices arising thereunder embrace matters of job abolishment, layoff and reassignment resulting from a layoff with regard to the individuals affected by the Duck Creek South line

sale who are able to retain their employment with C&NW. In addition, C&NW's claim that the agreements and attendant past practices extend to the related matters of its obligation to employees who are laid off after their positions are abolished appears to have at least some factual support.

It is true that the agreements are silent with regard to C&NW's obligation to provide, or its ability to avoid, the type of ameliorative, post-termination benefits sought by the RLEA unions. Thus, C&NW's contentions that the collective bargaining agreements contemplate abolishment of jobs without any of the severance-related benefits sought by the RLEA unions is based primarily, if not exclusively, on its claims as to the past practice or course of dealing under the provisions of the agreements that pertain to job abolishment and layoff. However, because nothing in the record indicates that the purported body of past practice relied on by C&NW is inconsistent with the express provisions of the agreements, this argument by C&NW cannot be rejected out of hand.

Our analysis leaves us convinced that even though C&NW's interpretation of the agreements and its contentions are subject to challenge, they are at least plausible. *See Machinists*, 830 F.2d at 748. Because C&NW's position has at least an arguable basis in the collective bargaining agreements and relevant past practice, it cannot be said to constitute the type of clear departure from those agreements necessary to trigger a finding of a § 6 major dispute under the RLA format. *See Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1022.[2]

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[2] The primary focus of RLEA's concern with the proposed Duck Creek South line sale is the fact that the current collective bargaining agreements between C&NW and the RLEA unions do not provide their members who will lose their jobs with C&NW with the type of additional severance benefits formerly imposed as a matter of course by the ICC as a condition of approving a proposed rail line sale. The record indicates that former C&NW em-

Our precedent clearly dictates that in a circumstance such as the present one, where a rail carrier and a union(s) disagree as the proper categorization of a labor dispute under the RLA, the federal courts must delineate a matter a minor dispute unless the carrier's claims of contractual justification are so frivolous or obviously insubstantial as to indicate that it is attempting to circum-

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ployees who go to work for FRVR will experience a reduction in pay and benefits and will lose the seniority standing they had accrued with C&NW. That the current collective bargaining agreements between C&NW and the RLEA member unions do not contain provisions pertaining to the pay, benefits and seniority standing of C&NW employees whose jobs are abolished and who subsequently accept employment with another rail carrier is not surprising.

RLEA attempts to bring the issues of the post-job abolition pay, benefits and seniority status of the individuals who will go to work for FRVR within the scope of the bargaining relationships between its constituent unions and C&NW by characterizing the change in the status of the current C&NW employees whose jobs with C&NW will be abolished by the Duck Creek South line sale as a "transfer" of their employment by C&NW to FRVR. That characterization is inaccurate. Those employees whose employment with C&NW is terminated who choose to accept positions with FRVR will not be transferred by C&NW. Their jobs with C&NW will be abolished. Thus, if and when the Duck Creek South line sale is consummated, CNW's actions as an employer rail carrier under the RLA will be limited to those concerned with the abolition of existing jobs and the layoff and/or reassignment of the employees whose positions are abolished. It is within this context that the minor dispute/major dispute determination called for by the RLA must be made in this case.

The actions of RLEA's member unions are understandable, especially in light of the ICC's current predisposition against imposing labor protective provisions as a prerequisite to approving rail line sales of the type at issue here. But in order to achieve the outcome sought by RLEA, *i.e.*, an order compelling C&NW to engage in negotiations under the § 6 RLA major dispute procedures and eventually submit its disagreements with the unions to the full range of dispute resolution devices provided thereunder, we must conclude that there are no bona fide issues of contract interpretation presented here. Given the nature and context of the current dispute between C&NW and the RLEA member unions, we are unable to reach that conclusion.

vent the § 6 RLA major disputes resolution procedure. *Machinists*, 830 F.2d at 746, *RLEA*, 833 F.2d at 704; *Burlington Northern*, 829 F.2d at 619. This is particularly true in controversies involving job abolition. *Machinists*, 830 F.2d at 749 ("It has been held before that where a collective bargaining agreement is susceptible of a non-frivolous interpretation allowing job abolition, disputes over actions effecting such job abolition are minor."). Given the arguable contractual/past practice bases for C&NW's position, we cannot conclude that it is either frivolous or obviously insubstantial.

Juxtaposition of the foregoing analysis as to the nature of the present controversy between C&NW and the RLEA-represented unions with the precedent in our Circuit and the remaining body of relevant RLA law, compels us to agree with the district court's categorization of this matter as a minor dispute under the RLA.[3] The district court's holding to that effect will be affirmed.

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[3] We have carefully examined the three key cases relied on by RLEA to support its claim that this case involves a major dispute under the RLA and we believe that none of the three is pertinent to our analysis. *Railway Labor Executives Association v. Pittsburgh & Lake Erie Railroad Co. ("P&LE")*, 845 F.2d 420 (3d Cir. 1988), does present a fact situation similar to the present case. However, there are two distinct features of the fact situation in that case which distinguish it from our case. First, *P&LE* did not involve a rail carrier selling a small portion of its rail lines to a non-carrier. Rather, the rail carrier in *P&LE* proposed to sell its entire rail operation to a non-carrier corporation. Second, and more importantly, there is no indication in the analysis by the Third Circuit in *P&LE* that it considered the effect of a claim by a rail carrier employer that its actions pertaining to the employees whose jobs were to be abolished by the proposed sale were sanctioned by and proper under the collective bargaining agreements between the carrier and the unions representing its employees.

The contractual base relied upon by C&NW is the key to our analysis of the minor dispute/major dispute bifurcation under the RLA scheme. Because the Third Circuit in *P&LE* did not address that topic in any way, we do not find its analysis of the minor dispute/major dispute RLA issue to be relevant or persuasive. We

C. The Remaining RLA Issues

The categorization of this matter as a minor dispute under the RLA establishes several additional facts relevant to our review of the district court's actions. First, because it involves a minor dispute, this controversy is within the exclusive jurisdiction of the NRAB. *RLEA*, 833 F.2d at 704. *See also Missouri Pacific Railroad Co. v. United Transportation Union*, 782 F.2d 107, 110 (8th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 3209 (1987). *IBEW*, 829 F.2d at 1428 ("Minor disputes . . .

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note further that the Third Circuit's subsequent decision in *Railway Labor Executives Association v. Consolidated Rail Corporation*, 845 F.2d 1187 (3d Cir. 1988), can also be distinguished from our case in that the Court therein determined that the issue in dispute, a drug testing program unilaterally instituted by the rail carrier, was not within the terms and conditions of employment incorporated in the parties' collective bargaining agreement. *Id.* at 1193-94. Unlike the Third Circuit in *Conrail*, we have determined that the issues in dispute in our case are at least arguably embraced within the scope of the collective bargaining agreements between the RLEA unions and C&NW.

We also believe that the holding of the Fifth Circuit in *United Industrial Workers v. Board of Trustees of the Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), is not relevant to our analysis. *Galveston Wharves* involved a rail carrier who was effectively terminating all of its rail operations by leasing its rail facilities to another corporation. The key to the Fifth Circuit's rejection of the rail carrier's claim that its dispute with the union representing its employees was not proper for submission to the NRAB was the finding that the carrier's action in leasing out its entire rail operation was neither a "layoff" nor an exercise of the carrier's management prerogatives under the collective bargaining agreement. *Id.* at 189. Rather, the Court viewed the carrier's action, and the dispute itself, as one involving the termination of a collective bargaining agreement that triggered the RLA § 6 major dispute resolution procedures. *Id.* at 189-90. Nothing in *Galeston Wharves* compels us to reach the result in a case, like ours, involving a sale by a rail carrier of a small portion of its track while maintaining the remainder of its all operations and continuing to honor its collective bargaining agreements. Therefore, we deem that case inapposite here.

must be referred to binding arbitration under the auspices of the National Railroad Adjustment Board.") The role of the federal courts in RLA minor disputes is very limited. Although they may determine the proper classification of a dispute under the RLA scheme, federal courts are prohibited from becoming involved in the merits of minor disputes. *Burlington Northern*, 829 F.2d at 620 ("The Railway Labor Act . . . prohibits federal courts from becoming involved in minor disputes. Minor disputes must be resolved through an arbitration process that is subject to very narrow judicial review."). Therefore, we conclude that the district court correctly determined that because the present controversy is a minor dispute under the RLA, it is subject to the exclusive jurisdiction of the NRAB, and must be resolved under the Act's § 3 RLA procedures. 45 U.S.C. § 153.

The second significant ramification of the minor dispute categorization pertains to the district court's determination that the strike threatened by the RLEA member unions should be enjoined. Strikes over minor disputes violate the RLA and may be enjoined by the federal courts in order to effectuate the RLA's purpose to provide for the compulsory arbitration of such matters by the NRAB. *Machinists*, 830 F.2d at 749 (citing *Chicago & Indian River*, 353 U.S. at 40-42, 77 S. Ct. at 640-41 (1957), and *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railway Co. (M-K-T)*, 363 U.S. 528, 531, 80 S. Ct. 1326, 1328 (1960)). *See also IBEW*, 829 F.2d at 1428; *Chicago & Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277 (7th Cir. 1981) (citing *Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33, 83 S. Ct. 1059 (1963)).

Thus, it is clear that the federal courts may issue injunctions against strikes in minor disputes in order to

protect the NRAB's exclusive jurisdiction over such matters. Because injunctions barring strikes in minor disputes are necessary to ensure the proper functioning of the § 3 RLA procedures, they are not proscribed by the *Norris-LaGuardia Act*. *Chicago River*, 353 U.S. at 40-41, 77 S. Ct. at 640-41. *See also Missouri Pacific Railroad Co.*, 782 F.2d at 110 (citing *Louisville & Nashville Railroad Co., supra*). For these reasons we must conclude that the district court acted properly in granting C&NW's motion for a preliminary injunction prohibiting the RLEA unions from striking during the pendency of the NRAB's adjudication of the current dispute.

One final question remains: the propriety of the district court's determination that it was without jurisdiction to grant RLEA's motion for a preliminary injunction to bar the Duck Creek South line sale. RLEA's argument in support of its motion is based solely on the claim that the present controversy is a major dispute under the RLA scheme. Once a district court finds that a major dispute exists, it may enjoin both the rail carrier and the union(s) from altering the status quo during the course of the negotiations and other impasse resolution procedures mandated by § 6 of the RLA. *Boston & Maine Corp.*, 788 F.2d at 797 (citing *Detroit & Toledo*, 396 U.S. at 155, 90 S. Ct. at 302). However, in the absence of a finding that a major dispute exists, a district court is without jurisdiction to issue a broad status quo injunction. *See Boston & Maine*, 788 F.2d at 797 (citing *Carbone v. Meserve*, 645 F.2d 96, 98 (1st Cir.), *cert. denied*, 454 U.S. 859, 102 S. Ct. 312 (1981). We have determined that the district court correctly categorized the parties' disagreements as to the proposed Duck Creek South line sale as a minor dispute. Accordingly, RLEA's claim that a status quo injunction of the type normally issued in RLA major disputes should have been granted by the district court in this case is moot

and can be dismissed. The district court was without jurisdiction to issue such an injunction.[4]

It is true that the district court, in its discretion, could have conditioned the preliminary injunction barring the RLEA unions from striking on C&NW's abstention from consummating the Duck Creek South line sale.[5] In *Machinists*, *supra*, our Court observed that the Supreme Court has held that "if an injunction against strike activity is issued in a minor dispute the district court retains its traditional equitable power to balance 'competing claims of irreparable hardship' in light of the Railway Labor Act's mandate that the guideline for fashioning the injunction be preservation of the [NRAB's] jurisdiction." 830 F.2d at 750 (quoting *M-K-T*, 363 U.S. at 534-35, 80 S. Ct. at 1330). RLEA has failed to show that a prohibition of the Duck Creek South line sale is necessary in order to preserve the NRAB's jurisdiction.

If the NRAB rejects C&NW's interpretation of the collective bargaining agreements and determines that the employees who are displaced by the challenged rail line sale are entitled to relief, it will be able to order the necessary payment of monies and adjustments in seniority levels it deems necessary to make those employees whole. Thus, it cannot be inferred that the legal remedy

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[4] Because we find in the RLA sufficient basis for holding that the district court was without jurisdiction to issue the status quo injunction sought by RLEA, we need not address the district court's holding that it was without jurisdiction to issue that injunction because it deemed RLEA's motion therefor an impermissible collateral attack on the ICC order approving the Duck Creek South line sale.

[5] RLEA did not challenge the district court's refusal to indirectly proscribe the Duck Creek South line sale by conditioning the strike injunction on C&NW's willingness to postpone the sale until the NRAB procedures are completed. Nevertheless, to ensure a full and comprehensive treatment of the RLA issues presented by this case, we briefly address that question.

available to the RLEA unions in this case (via the NRAB arbitration procedure) is inadequate. Further, RLEA has failed to demonstrate that an order barring the Duck Creek South line sale during the pendency of the NRAB's adjudication of this controversy is necessary to prevent any irreparable harm to its constituent unions or the employees they represent. Accordingly, we cannot conclude that the district court abused its discretion when it failed to condition the preliminary injunction barring a strike in this dispute on a suspension of the Duck Creek South line sale.

IV

Based on the foregoing analysis, we will affirm the order of the district court granting C&NW's motion for a preliminary injunction barring the RLEA member unions from striking pending adjudication of the parties' dispute by the NRAB and denying RLEA's motion for a preliminary injunction barring the Duck Creek South line sale. The Railway Labor Act and the attendant relevant case law provide a full and proper basis for affirming the district court. Consequently, we need not resolve the additional issues, raised by the district court's opinion and addressed in the arguments of the parties, with regard to the effect of the Interstate Commerce Act.[6]

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[6] In their briefs, C&NW and Plaintiff-Intervenor/Appellee Interstate Commerce Commission ask us to decide two additional issues rasied by the interface in this case between the Railway Labor Act and the Interstate Commerce Act. Those issues go to two questions: (i) whether RLEA's attempt to enjoin the Duck Creek South line sale constitutes an impermissible collateral attack on the ICC's decision to allow the sale to proceed; and (ii) whether the strike threatened by the RLEA unions could properly be enjoined by the district court in order to preserve what the ICC and C&NW maintain is the Commission's exclusive jurisdiction to determine "labor protection disputes" pertaining to the sale of rail lines. In the above analysis, we have determined that the relevant provisions of the RLA mandate that the injunction sought by the RLEA not issue and that the strike threatened by the

The order of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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RLEA unions be enjoined. Accordingly, we need not address the two additional Interstate Commerce Act-related issues raised by appellees.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 21, 1990

Before Hon. Richard A. Posner, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge

Nos. 89-3265, 89-3436

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Plaintiff-Appellee, Cross-Appellant,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 88 C 444—Paul E. Plunkett, *Judge*

ORDER

On July 31, 1990, defendants-appellants, cross-appellees filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX F

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh

45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 3

45 U.S.C. § 153

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as

have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such

vacancy occurs, the Mediation Board shall thereupon directly make the appontment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary

traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however*, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the

foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, in failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party

to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(*o*) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as

other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in the United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the di-

vision or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several division or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such

rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Therefore each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional

boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph *(l)* hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by

the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon which such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishing of the special board, shall consitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the

dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

D. Section 5 First

45 U.S.C. § 155 First

The parties, or either party, to a dispute between an employer or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

E. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said

Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX G

Railway Labor Executives' Association
Member Organizations

*American Railway & Airway Supervisors Association (Division of TCU);

*American Train Dispatchers Association;

*Brotherhood of Locomotive Engineers;

*Brotherhood of Maintenance of Way Employes;

*Brotherhood of Railroad Signalmen;

*Brotherhood of Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

*International Association of Machinists and Aerospace Workers;

*International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

*International Brotherhood of Electrical Workers;

*International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Seafarers International Union of North America;

*Sheet Metal Workers' International Association;

Transport Workers Union of America; and

*Transportation•Communications International Union (TCU)

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* Those RLEA member organizations which represent employees on respondent C&NW and are individual petitioners herein are designated by asterisks.

Supreme Court, U.S.
FILED
FEB 5 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY

CORRECTED COPY

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February 5, 1991

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QUESTIONS PRESENTED

1. Whether a railroad's ownership of a rail line is a "working condition" under § 6 of the Railway Labor Act, 45 U.S.C. § 156, such that the sale of the line is a mandatory subject of collective bargaining.

2. Whether this Court should decide whether or not the express and implied agreements between the Chicago & North Western Transportation Company and its unions apply to line sales.

3. Whether the proposal by a union to alter a collective bargaining agreement that gives a railroad the right to sell a rail line deprives the railroad of that right during negotiations over the proposal.

RULE 29.1 STATEMENT

Respondent Chicago & North Western Transportation Company is a wholly-owned subsidiary of CNW Corporation, which is wholly-owned by Chicago & North Western Acquisition Corporation, which is wholly-owned by Chicago & North Western Holdings Corporation. Union Pacific Corporation holds 100% of the non-voting preferred stock of Chicago & North Western Holdings Corporation. Respondent Chicago & North Western Transportation Company has the following subsidiaries apart from wholly-owned subsidiaries within the meaning of Rule 29.1 of this Court: Iowa Transfer Railway Company, Kansas City Terminal Company, MT Properties, Inc., Peoria & Pekin Union Railway Company, Trailer Train Company, Transportation Data Exchange, Inc., ACE Limited, Railroad Association Insurance, Ltd., Transportation & Railroad Assurance Company, Ltd., Transportation Quality Systems, Inc. and C&NW Realco, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-991

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY

INTRODUCTION

The Railway Labor Act ("RLA") divides all labor disputes over "rates of pay, rules, or working conditions" into two categories: major disputes under § 6 over proposals to change or create collective bargaining agreements; and minor disputes under § 3 over the interpretation or application of existing agreements.[1] In a major dispute, the parties are subject to a reciprocal status quo obligation, which prohibits the carrier from unilaterally

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[1] 45 U.S.C. § 156, 153 First(i). See, *e.g.*, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723-25 (1945).

implementing changes it proposes and the union from striking to enforce its demands until the Act's collective bargaining procedures have been exhausted.[2] In a minor dispute, the carrier is free to apply its interpretation of its agreements unless that interpretation is rejected by an arbitration board, whose jurisdiction is exclusive, and because of the exclusivity of the arbitration remedy, strikes over minor disputes are unlawful.[3] There is no disagreement between labor and management, or among the federal courts, about these fundamental principles (see Petition for Certiorari ["Pet."] at 4 n.5), but until recently there has been some uncertainty about how these principles apply when a rail carrier proposes to sell its lines and its unions propose to change the applicable labor agreements to restrict the carrier's rights in that regard.

In June 1989, however, this Court issued two landmark decisions under the RLA. In *Pittsburgh & Lake Erie R.R.* v. *RLEA*, 109 S. Ct. 2584 (1989) ["*P&LE*"], the Court held that a carrier's sale of its entire line is *not* a change in working conditions subject to the RLA's major dispute and status quo provisions, even though a major dispute may exist simultaneously over union proposals to change the carrier's existing agreements to protect employees from the effects of the sale. In *Consolidated Rail Corp.* v. *RLEA*, 109 S. Ct. 2477 (1989) ["*ConRail*"], the Court held that where a union seeks a status quo injunction against an action that the carrier claims is justified by its existing labor agreements, if the carrier's interpretation of the agreements is at least "arguable" or "not obviously insubstantial," the dispute between the parties is minor and the courts lack jurisdiction.

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[2] See *Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1960); *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966).

[3] See *Trainmen* v. *Chicago, R. & I. R. Co.*, 353 U.S. 30, 42 (1957).

Since these decisions came down, the Railway Labor Executives' Association and its affiliated unions (petitioners here, collectively referred to as "RLEA") have challenged several partial line sales. All of the courts of appeals that have passed upon the issue have rejected RLEA's claim that such sales give rise to major disputes and status quo violations, relying either upon *P&LE* or *ConRail* or both, as the Seventh Circuit did below.[4] Nonetheless, RLEA asserts that the Court should grant certiorari in this case to "finish the work which it began in *Pittsburgh & Lake Erie*" and to straighten out the courts of appeals, which RLEA claims are "hopelessly at odds" with each other and with this Court over the major/minor dispute dichotomy in the line sale context. (Pet. at 17, 24.) As we shall demonstrate, this is simply not the case.

STATEMENT OF THE CASE

1. *C&NW's Down-sizing.* For many years, respondent Chicago & North Western Transportation Company ("C&NW") has been unable to earn sufficient revenues from railroad operations to meet the statutory test of "revenue adequacy" under the Interstate Commerce Act.[5] To avoid financial collapse, C&NW has engaged in a massive and long-standing plant rationalization program, discontinuing operations on marginal lines that were sapping the vitality of the carrier's entire system.

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[4] *RLEA* v. *Chicago & N.W. Transp. Co.*, 890 F.2d 1024, 1025 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 3237 (1990); *CSX Transp., Inc.* v. *United Transp. Union*, 879 F.2d 990 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990); *General Committee of Adjustment* v. *CSX R.R.*, 893 F.2d 584 (3d Cir. 1990); *RLEA* v. *Chesapeake & W. Ry.*, 915 F.2d 116 (4th Cir. 1990), *cert. petition pending*, No. 90-1131.

[5] 49 U.S.C. § 10704(a)(2). See *e.g.*, *Railroad Revenue Adequacy—1988 Determination*, 6 I.C.C.2d 933 (1990); *Railroad Revenue Adequacy—1987 Determination*, 4 I.C.C.2d 731 (1988); *Railroad Revenue Adequacy—1986 Determination*, 3 I.C.C.2d 966 (1987); *Railroad Revenue Adequacy—1985 Determination*, 3 I.C.C.2d 541 (1987).

C&NW did this in part through abandonments of such lines, under authority granted by the Interstate Commerce Commission ("ICC"), which has jurisdiction over abandonments and all other rail line transactions. 49 U.S.C. §§ 10901, 10903, 10905, 11343. During the 20-year period preceding the line sale in this case, C&NW nearly halved the size of its system through such discontinuances, abolishing thousands of jobs as a result, all without protest by the unions under the RLA. (Pet. at 1a-2a.)

In 1985, the ICC gave carriers in C&NW's position an alternative to abandonments, by adopting an expedited authorization procedure for line sales to new entrants into the railroad industry. *Ex Parte No. 392*, 1 I.C.C.2d 810 (1986), *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *United States*, 817 F.2d 145 (Table) (D.C. Cir. 1987). While abandonments bring about permanent cessation of operations and thus permanent job loss, railroad operations and job opportunities for rail employees continue after sales to new railroads; accordingly, the ICC determined not to impose upon the parties to such sales the labor protective conditions that are imposed in abandonments. *Id.* at 815.

In 1987, C&NW agreed to sell some 208 miles of track in Wisconsin, known as the Duck Creek South lines, to a new company, the FRVR Corporation, under the ICC's *Ex Parte No. 392* procedure. The Duck Creek South lines were economically marginal, and the ICC determined that they had a significant "potential [for] future abandonment" unless they were sold to a new operator.[6]

Approximately 329 union employees worked on the Duck Creek South lines. Their jobs were subject to abol-

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[6] *FRVR Corp.—Exemption Acquisition & Opposition—Certain Lines of Chicago & N.W. Transp. Co.*, ICC Finance Docket No. 31205, slip op. p. 9 (served Jan. 29, 1988), *vacated on other grounds*, 888 F.2d 1277 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1808 (1990).

ishment upon consummation of the sale. Force-reduction provisions in C&NW's collective bargaining agreements allow the carrier to abolish jobs at its discretion upon specified notice to affected employees. The agreements also allow employees whose jobs are abolished to "exercise their seniority" to other available jobs on the railroad and provide other benefits for employees for whom no other jobs are available, including recall rights and continuation of their health insurance for four months. (C&NW S.A. at 1-2, 82.)[7] C&NW anticipated that all of the Duck Creek South employees would be able either to exercise seniority to vacant positions elsewhere on the railroad or to take jobs with FRVR, which offered C&NW incumbents a right of first hire. (C&NW S.A. at 66-68.)[8]

2. *The Unions' Demands.* When the unions learned of the proposed sale to FRVR, they served C&NW with a series of notices, ostensibly under RLA § 6, seeking to change their existing collective bargaining agreements to increase substantially C&NW's obligations to employees who would be affected by the sale. These notices included demands that C&NW alter its arrangement with FRVR to require FRVR to recognize C&NW's unions and assume its collective bargaining agreements, and that C&NW defer consummation of the sale until it reached "implementing" agreements with the unions, as well as demands that C&NW provide all affected employees with monetary benefits. (RLEA S.A. at 30-32.)

C&NW responded that the unions' notices were not subject to mandatory bargaining under the RLA, because, among other things, the notices sought to limit

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[7] "C&NW S.A." and "RLEA S.A." refer, respectively, to the Supplemental Appendices C&NW and RLEA filed with the court of appeals.

[8] As it happened, when the sale was consummated only four C&NW employees were either unwilling or unable to hold other railroad jobs with C&NW or FRVR. (C&NW S.A. at 82.)

C&NW's managerial prerogative to sell its lines. (Pet. at 15; see RLEA S.A. at 30-32.) Without prejudice to that position, however, C&NW attempted to negotiate with the unions, offering $30,000 severance pay to any employee deprived of a railroad job as a result of the sale. (C&NW S.A. at 8, 69-70.) RLEA rejected the carrier's offer, and C&NW then requested mediation from the National Mediation Board under RLA § 5 First, 45 U.S.C. § 155 First (the second step, after direct negotiations, in the major dispute procedures). The disputes over the union notices are now before the Board.[9]

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[9] Without any record support, RLEA suggests that C&NW has failed to bargain in good faith, because no mediation has occurred yet, allegedly "because of the dispute over the validity" of the union notices. (Pet. at 11 n.15.) C&NW has no control over the timing of mediation. The Mediation Board claims virtually unlimited discretion over the timing and progress of mediation. See *Int'l Ass'n of Machinists* v. *National Mediation Board*, 425 F.2d 527 (D.C. Cir. 1970). It has been known to delay mediation for years, and will not disclose its reasons for delay in any particular case. See, *e.g.*, *Boston & Maine Corp.* v. *National Mediation Board*, 669 F. Supp. 1, 2 (D.D.C. 1987). The Board has made no such disclosure in this case.

RLEA also asserts that C&NW and other carriers have refused to bargain over line sale demands served nationally upon all the major railroads in 1988, which were referred by Executive Order No. 12,714 to Presidential Emergency Board No. 219 under § 10 of the RLA, 45 U.S.C. § 160. (See Pet. at 11 n.15, 16 & n.18.) That is incorrect. While the carriers maintain that bargaining over line sales themselves is not mandatory, they recognize that they may be obliged to bargain over the *effects* that sales may have upon employees. Thus, C&NW and the other carriers responded to the unions' national notices with a counterproposal intended to provide additional protection to employees, including an offer of up to one year's pay as a severance allowance to any employee deprived of employment with his home railroad because of a line sale to a new railroad. Presidential Emergency Board No. 219, Carriers' Ex. 76 at ii. The unions rejected the carriers' counterproposal. The Emergency Board declined to recommend any additional benefits for employees affected by line sales. Presidential Emergency Board No. 219, *Report to the President* p. 116 (Jan. 15, 1991).

When C&NW scheduled the sale for consummation in March, 1988, the unions threatened to strike to block the sale.

3. *The Course of Litigation Below.* C&NW sought a preliminary injunction against the strike, and RLEA moved for a preliminary injunction to prohibit the sale. C&NW argued (a) that its existing agreements, both express and those implied from its past practice of unilaterally discontinuing its operations on economically weak lines, authorized the exercise of its managerial prerogative to sell lines and the related job abolishments, and (b) that a carrier does not lose its contractual rights, which are part of and define the status quo, simply because a union serves a notice proposing to change the contracts. Therefore, C&NW contended, while the disputes as to whether the agreements should be *changed* might be major if the unions' proposals related to rates of pay, rules, or working conditions, the quite distinct dispute over the carrier's *existing* rights during the status quo period is minor, because that dispute turns upon the "interpretation or application" of the agreements then in effect. 45 U.S.C. § 153 First (i).

RLEA claimed that the service of the union notices had the effect of taking away C&NW's right to consummate the sale pending bargaining. RLEA conceded that the sale did not violate any of the parties' existing express and implied labor agreements, and that these agreements (including their protective provisions), unless changed, applied to and would govern the effects that the sale would have upon employees. (See Pet. at 51a.) But RLEA maintained that the "working conditions" covered by the status quo pending bargaining over proposed changes in agreements include "employment terms that are not the subject of an agreement, either express or implied" and that C&NW's "managerial prerogative to sell its rail lines" is one such "non-agreement condi-

tion." [10] In other words, according to RLEA, even if a railroad's express and implied labor agreements do not limit one of the railroad's management prerogatives, the railroad may not exercise that prerogative once it becomes the subject of a union § 6 notice.

The district court held that C&NW's interpretation of its agreements as authorizing the sale and job abolishments was at least arguably correct and that RLEA's status quo claim therefore presented a minor dispute. Accordingly, the court preliminarily enjoined the threatened strike and denied RLEA's request for a preliminary injunction against the sale. (See Pet. at 44a.) The Seventh Circuit affirmed. (Pet. at 52a-53a.) This Court denied RLEA's petition for review. 488 U.S. 966 (1988), *rehearing denied*, 488 U.S. 1051 (1989). The line sale was then consummated on December 3, 1988.

In June 1989, while this case was pending before the district court on a summary judgment motion by C&NW, this Court held that a carrier's decision to sell its entire line is "so much a managerial prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter" of union § 6 notices served in response to the sale. *P&LE*, *supra*, 109 S. Ct. at 2595-96. This Court found no expression of such congressional intent in § 6 of the RLA, notwithstanding the prior decision in *Shore Line* v. *Transportation Union*, 396 U.S. 142, 153 (1969), which interpreted § 6 as requiring a carrier in a major dispute "to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose * * *." The Court distinguished *Shore Line* on two grounds: (1) *Shore Line* "did not involve a proposal by the rail-

[10] Brief for Appellants Railway Labor Executives' Association, *et al.* (7th Cir.) pp. 28, 30.

road to terminate its business," which is "not a change in the conditions of employment," *id.* at 2494, 2496; and (2) the carrier in *Shore Line* had attempted to change a past practice that had been "unquestioned * * * for many years," so that it had become an implied term in the parties' collective bargaining agreement. *Id.* at 2594, 2593. In addition, the Court held that the carrier's bargaining obligation with respect to union § 6 notices extended only to the effects of the sale on employees, and not to the fundamental managerial decision whether or not to sell. *Id* at 2597.

The district court in this case thereafter entered final judgment, making the strike injunction permanent, dismissing RLEA's status quo claim, and denying a request by RLEA for an order compelling C&NW to bargain with the unions. (Pet. at 34a.)

4. *The Decision Below.* The Seventh Circuit affirmed. It upheld the strike injunction, because § 6 forbids the unions to strike over their demands to change agreements "until the procedures for peaceful settlement established in that section are exhausted, and they have not been * * *"; and because any strike to block C&NW from acting on its asserted contractual rights with respect to the sale would also be unlawful under § 3, which forbids strikes over minor disputes. (Pet. at 23a-25a.) The court also upheld the dismissal of RLEA's status quo claim, holding that there were three wholly adequate and independent grounds for concluding that C&NW did not violate the status quo when it consummated the Duck Creek South sale. (Pet. at 16a.)

First, the court held that C&NW's decision to sell came within the carrier's fundamental managerial prerogatives, which are not subject to mandatory bargaining or status quo obligations under the RLA, as this Court recognized in *P&LE*. That is because the bargaining and status quo provisions under § 6 apply only to changes in "rates of pay, rules, and working conditions" (45 U.S.C.

§ 156); but a carrier's economically motivated decision to sell a line is "not a decision about the utilization of labor or about wages, work rules, working conditions, job rights, etc. It is a decision to reduce the extent of the railroad's business, akin to a manufacturer's decision to curtail its output * * *." (Pet. at 13a.) Under *P&LE*, C&NW is obliged to bargain over the effects of the sale in response to proper union § 6 notices, but not over the decision to sell.[11] Thus, the court held that there was no major dispute over the sale itself, and the sale could not violate any status quo obligation arising from union "effects" demands because "the relevant holding of [*P&LE*] * * * is that the right to demand 'effects bargaining' does not entitle the union[s] to prevent the sale." (Pet. at 14a.)

Second, the court held that even if C&NW *did* have a duty to bargain over the sale, the sale still did not violate the status quo. That is because under *P&LE's* reading of *Shore Line*, the status quo is defined by the collective bargaining agreements. (Pet. at 16a-17a.) Hence, there could be no violation, because RLEA concedes that the sale did not violate any of the parties' express or implied labor agreements. (See Pet. at 12.)

Third, the Seventh Circuit held that even if, as RLEA contended, the § 6 status quo obligation forbids a carrier from changing working conditions that are *not* covered by the parties' express or implied agreements, C&NW still had not violated the status quo. That conclusion followed from the court's ruling that C&NW was at least arguably correct in contending that the sale was authorized by its collective bargaining agreements, including implied agreements derived from the carrier's extensive

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[11] C&NW did not deny this obligation and was indeed bargaining over the unions' § 6 notices, and the court therefore held that the district court rightly denied the unions' request for a bargaining order, because "no order is needed to compel what is already being done * * *." (Pet. at 15a-16a.)

past practice of discontinuing operations on abandonable lines. (Pet. at 19a.)[12] Thus, under *ConRail, supra*, any disagreement by the unions on that interpretation of C&NW's contractual rights gave rise to an arbitrable minor dispute, in which the district court could not grant a status quo injunction and over which the unions may not strike. 109 S. Ct. at 2480-84. If the unions do *not* dispute the carrier's interpretation, then their only recourse is to "try to change the agreement for the future, by filing a § 6 notice," but they cannot strike to "break the contract" without first exhausting the major dispute procedures. (Pet. at 24a-25a.)

In short, C&NW did not violate the status quo and the unions were not entitled to strike for any or all of the reasons that (1) the sale was committed to managerial prerogative, and was not subject to mandatory bargaining; (2) the collective bargaining agreements did not expressly prohibit the sale, leaving C&NW free to consummate it; and (3) the agreements can be read positively to confer on the carrier the right to make the sale.

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[12] The court also relied upon RLEA's concession that the Duck Creek South sale did not violate any collective bargaining agreements, for "[w]hat the agreements do not expressly or impliedly forbid they permit * * *." (Pet. at 21a.)

ARGUMENT

I. THE RULING BELOW THAT C&NW'S OWNERSHIP OF THE LINE WAS NOT A "WORKING CONDITION" DOES NOT WARRANT REVIEW

The Seventh Circuit's managerial prerogative holding is fully consistent with decisions of this Court, including *P&LE*, and is required by the RLA itself. The bargaining and status quo obligations under RLA § 6 apply *only* to "rates of pay, rules, and working conditions." 45 U.S.C. § 156. A carrier's ownership of its lines and other assets is none of these things. It is clearly not a "rate of pay" or a "rule," and it cannot be a "working condition," for *P&LE* held that a carrier's decision to sell its entire line "is not a change in the conditions of employment" subject to the RLA's bargaining and status quo provisions. 109 S. Ct. at 2596. If a carrier's ownership of its lines is not a working condition, then no change in that ownership, whether partial or entire, is a change in "working conditions" under RLA § 6, and no change in ownership can violate the status quo under *any* reading of *Shore Line*.

This conclusion follows from *P&LE* itself, even though that case did not involve a partial line sale. In holding that a carrier's sale of its entire line is not a change in working conditions under § 6, the Court drew upon the doctrine of management prerogative under the National Labor Relations Act ("NLRA"): Some employer decisions, despite their effects upon employees, are " 'so peculiarly matters of management prerogative' " that they cannot be considered "terms and conditions of employment" subject to mandatory bargaining and status quo obligations under § 8(d) of the NLRA, 29 U.S.C. § 158(d). 109 S. Ct. at 2595 & n.17, *quoting Textile Workers* v. *Darlington*, 380 U.S. 263, 267 (1965) and *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 686 (1981).

First National Maintenance held that this management prerogative extends to an employer's economically motivated decision to discontinue a part of its business, because such a decision involves "a change in the scope and direction of the enterprise" and "is akin to the decision whether to be in business at all." 452 U.S. at 677. Such a decision may result in the elimination of jobs and the employer must bargain over such effects on employees—but *not* over the decision itself: "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. * * * [I]n view of an employer's need for unencumbered decisionmaking * * * the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *Id.* at 678-79, 686. Thus, an employer's decision to close down part of its business "is *not* part of § 8(d)'s 'terms and conditions,' * * * over which Congress has mandated bargaining." *Id.* at 686 (original emphasis).

There is no basis for a different result under the RLA. A railroad, no less than any other employer, needs the freedom to determine "the scope and direction of [its] enterprise." 452 U.S. at 677. Prohibiting a carrier from consummating a line sale and thereby shutting down a part of its business until it either obtains the unions' consent to the sale or exhausts the RLA major dispute procedures, which this Court has aptly characterized as "virtually endless," [13] would substantially encumber the carrier's property rights in its lines.[14] The RLA phrase

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[13] *Burlington N. R. Co.* v. *Maintenance of Way Employes*, 481 U.S. 429, 444 (1987).

[14] Property ownership carries with it a "group of rights," including the right to "*dispose of* it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377-88 (1945) (emphasis added).

"working conditions" cannot be construed to do that if, as this Court held in *First National Maintenance*, the NLRA phrase "terms and conditions of employment" does not encumber the property of other employers. "Working conditions" on its face is no broader than "terms and conditions of employment," and if anything is narrower, as the legislative history of the NLRA indicates. In 1947, when the Taft-Hartley amendments to the NLRA were debated, the Senate considered borrowing the term "working conditions" from the earlier RLA to define the scope of mandatory bargaining for non-rail employers, but Senator Wagner (a principal sponsor of the NLRA), objected that by "substituting the narrower term 'working conditions' for the present broader term 'conditions of employment,' the bill would narrow the scope of collective bargaining to exclude many subjects * * *." 93 Congressional Record 3322, 3323 (1947). Thus, it has long been accepted under the NLRA that a "comparison of the language of the two Acts shows that Congress in the [NLRA] must have intended a bargaining provision of broader scope than that contemplated in the [RLA]," because "it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 254-55 (7th Cir. 1948), *aff'd on other grounds sub nom. American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950).

RLEA purports to find support for a contrary result in *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), which RLEA reads as holding that a partial "business closure" is a mandatory bargaining subject. (Pet. at 13, 17.) *Telegraphers*, however, did not involve a "business closure" of any kind. There, the railroad proposed to consolidate clerical functions performed at local stations along certain lines, reducing jobs along those lines while continuing to conduct the same business on them. On these facts, as *P&LE* recounts, "a closely divided Court" held that the railroad's proposal to "abol-

ish some jobs was a bargainable issue." 109 S. Ct. at 2595 & n.17; see 362 U.S. at 332-41. *P&LE* then specifically distinguished *Telegraphers* on grounds that are equally applicable to C&NW's decision to leave the market served by the Duck Creek South lines: that *Telegraphers* did not deal "with a railroad's freedom to leave the market." 109 S. Ct. at 2595 n.17.

The Seventh Circuit's decision that the partial line sale in this case was not a change in "working conditions" does not conflict with any decisions of this Court or other courts of appeals.[15] RLEA's request that this Court grant certiorari to decide whether *P&LE*'s managerial prerogative holding applies to a partial "business closure" (Pet. at 17) should be denied.

II. THE RULING BELOW THAT THE STATUS QUO IN A MAJOR DISPUTE IS DEFINED BY THE EXISTING LABOR AGREEMENTS DOES NOT WARRANT REVIEW

The Seventh Circuit's second alternative holding, that C&NW's status quo obligation pending any major dispute over the union § 6 notices was defined by the collective bargaining agreements, simply echoed this Court's reading in *P&LE* of its prior decision in *Shore Line*. RLEA maintains that the Seventh Circuit effectively overruled *Shore Line*, which RLEA reads as extending the status quo obligation to "non-agreement" conditions

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[15] Only one other court of appeals, the Eighth Circuit, has addressed the question whether partial line sales are covered by P&LE's managerial prerogative holding. The Eighth Circuit case, which involved a prior partial line sale by C&NW and a resulting status quo claim by RLEA, held that under *P&LE*, "C&NW was not required to bargain over the sale in this case prior to the sale's completion * * * nor was it obligated to maintain the status quo and postpone the sale," even though the carrier does have an obligation to bargain with the unions with respect to "the *effects that the sale* might or will have on its employees." *RLEA* v. *Chicago & N.W. Transp. Co., supra,* 890 F.2d at 1025 (original emphasis). The Seventh Circuit reached exactly the same conclusion below.

—*i.e.*, those not addressed by the parties' express and implied agreements—and hence to prohibit a carrier from taking actions that the collective bargaining agreement "neither authorizes nor prohibits." (Pet. at i-ii.) Even if RLEA were right on that score, however, the question whether the § 6 status quo allows carriers to take actions that are neither authorized nor prohibited by their agreements is presented in this case in an entirely abstract and academic way. That is so because the court of appeals ruled that C&NW was arguably correct in contending that its labor agreements, including implied agreements derived from its extensive past practice of abandoning lines, affirmatively gave it the right to make the sale—a ruling RLEA does not contest. (See Pet. at 12 n.16.) It would look very much like an advisory opinion for this Court to reach RLEA's argument as to the scope of the § 6 status quo, and render a decision concerning the effect of labor agreements that are silent on an issue, without first deciding whether or not the agreements really *are* silent. But that threshold question cannot be decided by a court in this case. Whether the agreements are silent, or, as C&NW plausibly contends, they positively authorized the sale, is a minor dispute committed to the exclusive jurisdiction of an arbitration board. *ConRail*, *supra*, 109 S. Ct. at 2481.

In short, unless this Court were to overrule *ConRail* and its numerous earlier decisions holding that courts may not adjudicate the merits of minor disputes,[16] *and* undertake a review of the parties' written and implied collective bargaining agreements, *and* hold that those agreements do not address line sales (as they plainly do), it is hard to see how the Court would ever reach the question whether the § 6 status quo applies to "non-agreement" conditions. Thus, that question is presented too abstractly in this case to warrant review. See

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[16] See, *e.g.*, *Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972); *Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38 (1963).

The Monrosa v. *Carbon Black, Inc.*, 359 U.S. 180, 183-84 (1959).

Even if the question could be reached, it does not warrant review, because the Seventh Circuit's view of *Shore Line* was correct.[17] In that case, the carrier's train crews had traditionally reported to work at its Lang Yard, and the carrier attempted to change the reporting point while a union § 6 notice seeking to prohibit such changes was pending. 396 U.S. at 145. This Court held that the change violated the § 6 status quo because it altered the "objective working conditions" in effect before the major dispute over the union notice arose. *Id.* at 153. The carrier's formal written agreement with the union did not prohibit the change, but, as this Court explained in *P&LE*, "the prior practice, the objective working condition, was to have crews report for work and come back at Lang Yard. * * *[R]eporting at Lang Yard, we thought, had been the unquestioned practice for many years, and we considered it reasonable for employees to deem it sufficiently established that it would not be changed without bargaining and compliance with the status quo provisions of the RLA." 109 S. Ct. at 2594.

As this Court noted in a case arising under the NLRA, the "practices of the industry and the shop [are] equally a part of the collective bargaining agreement although not expressed in it." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). The same rule—which is universally accepted general contract law[18]—applies under the RLA. See, *e.g.*, *ConRail*, *supra*, 109 S. Ct. at 2485; *Transportation Union* v. *U.P. R. Co.*, 385 U.S. 157, 161 (1966). *Shore Line* did not reject this principle. On the contrary, the Court there acknowledged that where an established working condition "is

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[17] There are no conflicts among the circuits. The Seventh Circuit is the *only* court of appeals that has addressed this question after *P&LE*.

[18] See, *e.g.*, Restatement (Second) of Contracts § 223 (1981).

satisfactorily tolerable to both sides, it is often omitted from the [formal] agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others." 396 U.S. at 155. Thus, as this Court said in *P&LE*, *Shore Line* itself recognized that "not all working conditions to which parties may have agreed are to be found in written contracts." 109 S. Ct. at 2593, citing *Shore Line*, 396 U.S. at 154-55. The Seventh Circuit was entirely correct when it concluded that "with this understanding of 'practice' " as giving rise to implied agreements, "*Shore Line* is seen to be fully consistent with the proposition that the status quo is defined by the agreement of the parties * * *." (Pet. at 18a.) That "understanding" is altogether unremarkable, is supported by numerous decisions of this Court, and need not be reaffirmed yet again.

III. THE RULING BELOW THAT CONSUMMATION OF THE SALE CREATED ONLY A MINOR DISPUTE DOES NOT WARRANT REVIEW

The Seventh Circuit's third alternative holding, that C&NW's interpretation of its contractual authority was arguably correct, and that the unions' objections to the sale created only a minor dispute over which they could not lawfully strike, reaffirms the court's earlier ruling to the same effect on appeal from the preliminary injunction against the strike. (See Pet. at 55a.) RLEA's unsuccessful petition for review of that decision presented essentially the same question RLEA now presents with respect to this alternative holding. (See Petition for Certiorari, No. 88-464.)

RLEA asserts that the question has come to merit review because since *P&LE* and *ConRail* were decided a five-way inter-circuit conflict has arisen in the various line sale cases the unions have lost. (Pet. at 21-22.) RLEA further asserts that the decision below and the supposedly conflicting ones in other circuits *also* conflict with the dispute resolution procedures of the RLA by

depriving the unions of their right to bargain over the employment effects of lines sales. (*Id.* at 22-24.) There are no such conflicts, however.[19]

There is nothing novel about the minor dispute issue in this case. It frequently happens that, while a § 6 notice is pending under the major dispute procedures, the carrier will make a change that it believes is authorized by its existing agreements, and labor will claim that this action violates the status quo. Indeed, as happened here, a union may serve a § 6 notice after it learns of a proposed management change, seeking to provide the basis for a status quo claim.[20] It has long been well-settled, however, that the status quo includes the carrier's rights under existing agreements, for "to freeze physical conditions in existence on the day the Section 6 notice was filed," depriving the carrier of an existing contractual right to make unilateral changes, "would not

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[19] RLEA has asserted elsewhere that a more general confusion among the circuits exists over the application of the major/minor dispute dichotomy in all § 6 status quo cases, relying on the various opinions by the judges of the District of Columbia Circuit on that court's denial of *en banc* consideration in *ALPA* v. *Eastern Air Lines, Inc.*, 863 F.2d 891 (D.C. Cir. 1988), *cert. petition pending*, No. 88-1403. See *RLEA* v. *Chesapeake & Western*, S. Ct. No. 90-1131, Petition for Certiorari, p. 23. The question as to which those opinions noted a potential conflict among the circuits, however, is whether or not a minor dispute can exist *after the parties' collective bargaining agreements have expired.* See 863 F.2d at 899, 918 (Mikva, J., dissenting), 922 (Edwards, J., dissenting), 927 (Silberman, J., concurring). That question is not presented here; the minor dispute holding below was based on agreements that indisputably were in effect at the time of the Duck Creek South sale and remain in effect today.

[20] See, *e.g.*, *Rutland Ry.* v. *Brotherhood of Loc. Eng.*, 307 F.2d 21, 33 (2d Cir. 1962) ("Since a Section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice * * * so as thereby to make" a controversy over a disputed unilateral action by the carrier "appear more like a major dispute"), *cert. denied*, 372 U.S. 954 (1963).

be a continuation of any prior existing condition. It would be the creation of a new condition." [21] *Shore Line* itself recognized this, for this Court was at pains there to note that, even though the written agreements did not address the carrier's right to make the challenged changes in work assignments, the union's service of a § 6 notice seeking an express prohibition of such changes "would not have barred the railroad from ordering the assignments * * * if, apart from the [written] agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions," *i.e.*, part of the parties' implied agreement. 396 U.S. at 153-54; see *P&LE*, 109 S. Ct. at 2593. Otherwise the status quo provision of § 6 would provide either party to a labor agreement with an instrument for unilateral destruction of the other's contractual rights, contrary to the RLA's mandate that the parties "maintain agreements," except as they are altered through subsequent agreements. 45 U.S.C. § 152 First.

Because a union cannot deprive a carrier of its contractual rights simply by serving a § 6 notice, where a union disputes an arguable or non-frivolous carrier claim of contractual authority to act during the status quo period, the status quo claim necessarily raises a minor dispute. By the plain terms of RLA § 3 First (i), *all* disputes over the "interpretation or application" of labor agreements are minor disputes. 45 U.S.C. § 153 First (i). Thus, in such a case, there are two separate, albeit re-

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[21] *Baker* v. *United Transp. Union*, 455 F.2d 149, 157 (3d Cir. 1971); see also, *e.g.*, *Shore Line*, *supra*, 396 U.S. at 153-54; *RLEA* v. *Boston & Maine Corp.*, 808 F.2d 150, 156 (1st Cir. 1986), *cert. denied*, 484 U.S. 830 (1987); *REA Express, Inc.* v. *Brotherhood of Ry., Airlines & S.S. Clerks*, 459 F.2d 226, 231 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972); *United Transp. Union* v. *St. Paul U. Depot Co.*, 434 F.2d 220, 223 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *Rutland Ry.*, *supra*, 307 F.2d at 34; *Hilbert* v. *Pennsylvania R.R.*, 290 F.2d 881 (7th Cir.), *cert. denied*, 368 U.S. 900 (1961).

lated, disputes: the § 6 notice gives rise to a *major* dispute over the proposed *new* agreement; but the union's status quo claim gives rise to a *minor* dispute over the parties' rights and obligations under the *existing* agreement.[22] The pendency of a major dispute over a proposed new agreement cannot transform a minor dispute over the carrier's rights under existing agreements into a major one.[23]

These commonplace principles are the basis for the minor dispute holding below. The court of appeals recognized that "the unions can make the railroad bargain over the effects of the Duck Creek South sale on the workers"; that the union notices were "in mediation, one of the minuettes in the [major dispute] quadrille"; and that the unions can strike in support of proper "effects" demands "once all peaceable means of dispute resolution have been exhausted." (Pet. at 15a, 14a, 24a.) Until then, however, the unions are "bound by the agreement[s]," which in the court's view supported C&NW's claim of contractual authority for the sale. (*Id.* at 19a, 24a.) Thus, the court did *not*, as RLEA claims, hold that the disputes over the unions' proposed changes in the agreements are minor, or in any way deprive the unions of their right to bargain over the effects of the sale, or rule out a strike if the unions exhaust the major dispute

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[22] See, *e.g.*, *Boston & Maine*, *supra*, 808 F.2d at 156; *REA Express*, *supra*, 459 F.2d at 226; *Rutland Ry.*, *supra*, 307 F.2d at 36; *Hilbert*, *supra*, 290 F.2d at 885. Of course, if during a major dispute a carrier takes action that is not arguably justified under the existing agreement, as where the carrier makes a change that is contrary to "the long-standing interpretation * * * which had been given by the parties to the existing agreement," the courts have jurisdiction to issue a status quo injunction under § 6. *Southern Ry.* v. *Brotherhood of Loc. Firemen & Enginemen*, 337 F.2d 127, 132 (D.C. Cir. 1964).

[23] See, *e.g.*, *Carbone* v. *Meserve*, 645 F.2d 96, 100 (1st Cir.), *cert. denied*, 454 U.S. 859 (1981); *Rutland Ry.*, *supra*, 307 F.2d at 33; *Hilbert*, *supra*, 290 F.2d at 885.

procedures on proper effects demands. (Pet. at 23-24.) The court held, rather, that RLEA's status quo claim presented a minor dispute over which the unions may not strike, because it stands or falls on C&NW's arguable claim of contractual authorization for the sale. "Filing a § 6 notice may kick off a major dispute" but "does not transform a minor dispute into a major one." (Pet. at 19a, 25a.)[24]

That is precisely the holding of the Fourth Circuit case that RLEA claims is in conflict with the decision below, *RLEA* v. *Chesapeake & W. Ry.*, *supra*, 915 F.2d at 120. (See Pet. at 23.) Moreover, none of the holdings in other line sale cases cited by the RLEA is to the contrary. In the Second and Third Circuit cases, the question was whether the carriers, in response to union status quo claims, had made arguable showings of contractual authority to consummate partial line sales "pending completion of bargaining under the [RLA] over the effects" of the sales on employees; the courts held that the carriers had met their burden and accordingly that the status quo claims raised minor disputes. *CSX Transp. Co.* v. *United Transp. Union*, *supra*, 879 F.2d at 992, 998-99; see *General Committee of Adjustment* v. *CSX R.R.*, *supra*, 893 F.2d at 585, 593. Both courts recognized, as did the court in this case, that a proposal by

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[24] RLEA claims that there can be no minor dispute in this case because there is "no disagreement" over the interpretation of the agreements. (Pet. at 12.) But RLEA persistently maintains that "line sales [are] neither authorized nor prohibited by the agreements" (Pet. at 8 n.11), while C&NW maintains that its implied agreements derived from its past practice of discontinuing operations on abandoned lines do affirmatively authorize other discontinuances, including line sales, and the court of appeals upheld that contention as arguably correct. (Pet. at 19a.) That *is* a minor dispute, although its merits are immaterial unless the court of appeals erred both in holding that the sale did not involve any change in working conditions and that the status quo is defined by the parties' agreements.

either party to change existing agreements governing rates of pay, rules, or working conditions gives rise to a major dispute. 879 F.2d at 996; 893 F.2d at 590.

Nor does the decision below conflict with the Eighth Circuit's holding in *RLEA* v. *Chicago & N.W. Transp. Co.*, *supra*, that union § 6 notices, insofar as they pertained to the effects of a line sale, gave rise to a major dispute rather than a minor one. 890 F.2d at 1026. There is no inconsistency between the holding in this case that a status quo controversy over the interpretation and application of *existing* agreements is a minor dispute, and the Eighth Circuit's holding that a controversy over the adoption of proposed *new* agreements is a major dispute.

In sum, the decision below is fully supported by decisions of this Court and plainly correct on all three grounds upon which it rests, although any one of those grounds is sufficient to support the judgment. Since this Court's decision in *P&LE*, every federal court that has dealt with a line sale case under the RLA has concluded that the sale did not violate the status quo, and that the unions could not lawfully strike to protest or prevent consummation. While the courts have arrived at those conclusions by a variety of routes, depending on the claims and defenses in the various cases, there are no conflicts in their holdings. Hence, in the year-and-a-half since *P&LE* the lower federal courts, with the aid of the decisions in *P&LE* and *ConRail*, have gone very far toward eliminating the labor strife over line sales that led this Court to grant certiorari in *P&LE*. There is no unfinished business in this area meriting this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 5, 1991